

WOMEN AND PART-TIME WORK: THE CASE FOR PAY EQUITY AND EQUAL ACCESS

MARTHA CHAMALLAST†

I.	THE PART-TIME WORK FORCE	713
A.	<i>Definition of Part-Time Work</i>	713
B.	<i>Female Character of the Part-Time Work Force</i>	714
C.	<i>Pay Disparity Between Full-Time and Part-Time Workers</i>	715
1.	Personal Characteristics of Workers	716
2.	Lack of Unionization.....	717
3.	Unequal Pay for Equal Work	717
4.	Undervalued Work and Occupational Segregation	718
5.	Paucity of Desirable Part-Time Jobs.....	719
6.	Negative Employer Perceptions	719
II.	FEMINISM AND PART-TIME WORK	722
A.	<i>Inattention to the Treatment of the Part-Time Work Force</i> ...	722
B.	<i>Working and Motherhood: Perceptions of Incompatibility</i>	725
C.	<i>Perpetuation of Male Dominance in the Two-Parent Family</i> ..	731
D.	<i>Debating Strategies for Reform</i>	733
III.	ANTIDISCRIMINATION LAWS AND PART-TIME WORKERS.....	736
A.	<i>The Equal Pay Act—Existing Doctrine</i>	737
1.	Basic Elements of an Equal Pay Act Claim	737
2.	Agency Interpretations of the Fourth Affirmative Defense	739
3.	Supreme Court Cases Interpreting the Fourth Affirmative Defense	742
4.	Lower Court Cases Interpreting the Fourth Affirmative Defense	746
B.	<i>Reforming the Equal Pay Act for Part-Time Workers</i>	749
1.	The Case Against a Subjective Standard	750
2.	Implications of Varying Objective Approaches	753
C.	<i>Title VII—Existing Doctrine</i>	759
1.	Case Law on Access	760
2.	Voluntary Part-Time Workers and Comparable Worth...	760
3.	The Ambiguity of <i>Gunther</i>	762
4.	Analysis of Lower Court Comparable Worth Cases.....	763

† Professor of Law, University of Iowa.—I wish to thank Peter Shane for his substantive and stylistic contributions to this Article. I am also indebted to Jeff Powell for his thoughtful critique and to Diane Brazen and Lissa Shea for their research assistance.

D. <i>Fitting Comparable Worth to Part-Time Work</i>	768
1. The Part-Time Worker's Double Burden.....	769
2. Reforming Title VII for Part-Time Workers	770
IV. CONCLUSION	774

Part-time workers in the United States often encounter significant obstacles in their search for challenging and rewarding part-time jobs. Two of the major obstacles are pay disparities between full-time and part-time workers and part-time workers' lack of access to desirable, highly compensated part-time jobs. Because the part-time work force is predominantly female, Professor Chamallas adopts a feminist perspective in examining the problems of part-time workers, arguing that discrimination against part-timers is a species of discrimination against women. The Article begins with an examination of the character of the part-time work force and the pay disparities that exist between full-time and part-time workers. Using sociological data, the Article next explores the connection between sex discrimination and the plight of the part-time worker. After a review of federal laws prohibiting sex discrimination in employment, Professor Chamallas proposes new interpretive approaches to the Equal Pay Act and Title VII of the Civil Rights Act of 1964 that would help to provide part-time workers with pay equity and equal access to desirable part-time employment.

Because millions of Americans work only part-time,¹ the availability of good part-time jobs is often essential to them in balancing the demands of economic self-support with their other responsibilities. Part-time work fits the needs and desires of several distinct groups of employees. For example, students may need to work part-time to finance their educations. Older workers may wish to make a gradual transition into retirement. Physically handicapped workers may be incapable of working a forty hour week.²

Above all, part-time work holds a special attraction for parents. When they cannot meet the competing demands of a full-time job and a newborn baby, even the most career-minded parents may wish to find part-time employment. The parents of a newborn may wistfully recall that, when they were growing up, one full-time job seemed to provide sufficient income to raise a family. Consequently, they may expect that if each parent works twenty hours a week, that work will generate enough money to support the family. For the single parent who bears the burden of childrearing alone, there is also the dream of the ideal

1. As of February 1985 there were 13,647,000 voluntary part-time workers in the United States. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS 45 (Mar. 1985).

2. See, e.g., Federal Employees Part-Time Career Employment Act of 1978, 5 U.S.C. §§ 3401-3408 (1982) (enacted in part to help persons who are unable to work standard working hours, such as students, older workers, and physically handicapped workers, secure permanent part-time work). The Act requires all federal agencies to establish and maintain a program for part-time career employment. One purpose of the Act is to provide increased employment opportunities for persons unable to work standard working hours. S. REP. NO. 1116, 95th Cong., 2d Sess. 1, 6, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 2596, 2596, 2601.

part-time job—a job that pays enough to live on, yet allows the parent ample time with his or her children.

These idyllic scenarios are rare in the American workplace. Part-time work has yet to function as a viable solution to the career/childrearing conflict. Instead, part-time employment is decidedly second class. Part-time work is underpaid, concentrated in the services sector, and regarded as marginal and inferior employment by employers and society alike.

The overwhelming majority of part-time workers are women, most often women with children.³ Because part-time work is primarily “women’s work,” it tends to occupy the same low position in the hierarchy of work as does full-time predominantly female work.

The central perspective of this Article is that the inferior status of part-time employment stems in part from sex discrimination. Drawing on the feminist theory emerging in the “pay equity” or “comparable worth” movement,⁴ this Article begins with the premise that the female character of the part-time work force has contributed to the undesirable plight of part-time workers, both male and female.

To date, the principal laws prohibiting sex discrimination in employment, notably the Equal Pay Act⁵ and Title VII of the Civil Rights Act of 1964,⁶ have provided scant protection for part-time workers. Part-time employees have not yet achieved either pay equity or equal access to employment. Part-time workers are sometimes paid less than full-time workers for identical work⁷ and are frequently paid less than full-time workers for different work of comparable value.⁸ Further, part-time workers are likely to be excluded altogether from better paying, higher status positions.⁹ Unless employees are willing to work

3. See *infra* text accompanying notes 23-29.

4. The United States Supreme Court has characterized a comparable worth claim as one in which “plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community.” *County of Washington v. Gunther*, 452 U.S. 161, 166 (1981). Although the precise definition of the term is unclear, the crux of a comparable worth claim is that a job classification comprised predominantly of females is paid at a rate lower than its evaluated worth, measured by such factors as knowledge, skill, and mental or physical demands. As one lower court has observed, the

quintessential element common to all [definitions of comparable worth] is that discrimination exists when workers of one sex in one job category are paid less than workers of the other sex in another job category and both categories are performing work that is not the same in content, but is of comparable worth to the employer in terms of value and necessity.

Power v. Barry County, 539 F. Supp. 721, 722 (W.D. Mich. 1982). Comparable worth theory thus may be used to challenge wage rates in predominantly female jobs even when there is no identical or similar job performed by males at a higher wage. The term “pay equity” is sometimes used interchangeably with “comparable worth.” It may also be used as a broader term to describe any reform measure aimed at upgrading the pay of women workers. For example, if a plaintiff claims that her employer intentionally depressed the wage rate for female jobs, her claim is for pay equity, but it is not, strictly speaking, a comparable worth claim. For an explanation of another distinction sometimes made between comparable worth and comparable work claims, see *infra* notes 282-83.

5. 29 U.S.C. § 206(d) (1982).

6. 42 U.S.C. § 2000e (1982).

7. See *infra* text accompanying notes 45-48.

8. See *infra* text accompanying notes 49-55.

9. See *infra* text accompanying notes 56-59.

forty hours a week, they often are not considered for such desirable jobs, regardless of their qualifications or experience.

This Article suggests new ways of interpreting the Equal Pay Act and Title VII to provide fuller protection for both female and male part-time workers. Although these interpretations alone are unlikely to transform the status or reputation of part-time work, they may reveal some of the ways unfavorable treatment of part-time workers is linked to sex discrimination.

Part I¹⁰ of the Article sketches a picture of the part-time work force in the United States. It explains the varying definitions of part-time work and describes the sectors in which part-time workers are employed. Statistics on the sexual composition of the part-time work force are reviewed, and the pay disparity between part-time and full-time workers is documented. Finally, Part I explores possible reasons for this pay disparity and catalogues the negative perceptions about part-time work that perpetuate the disparity.

Part II¹¹ considers part-time work from a feminist perspective and attempts to explain the adverse treatment of part-time workers as a special brand of sex discrimination. It presents an account of the part-time worker as inseparable in the public consciousness from the "working mother." Public opinion data is analyzed to discover how attitudes towards working mothers might simultaneously justify the inhospitable treatment of part-time workers and perpetuate the economic dependence of married working women. The conclusion of Part II addresses the reluctance of some reformers to encourage part-time work.

Part III¹² analyzes the existing legal framework outlawing sex discrimination in employment, with a particular focus on sex discrimination affecting part-time workers. It examines relevant developments under the Equal Pay Act and Title VII and presents two proposals for reinterpreting these statutes to provide a partial solution to the problems of pay inequity and unequal access that afflict part-time employees.

The first proposal¹³ provides a remedy for pay inequity for part-time workers under the Equal Pay Act. The major thrust of the proposal is that the basic principles of the Equal Pay Act should apply in full force to part-time employees and that there should be no blanket exemption for any class of part-time workers. Under this proposal, part-time workers asserting a claim under the Equal Pay Act would be required to establish that although they perform work substantially equal to that of full-time workers, they receive less pay, including fringe benefits. Once this *prima facie* showing had been made, the employer could defend only by proving that its part-time workers were less effective or qualified than their full-time counterparts.

The second proposal¹⁴ provides a special framework for litigating Title VII "comparable worth" cases on behalf of part-time workers. The proposal is a

10. See *infra* text accompanying notes 15-84.

11. See *infra* text accompanying notes 85-161.

12. See *infra* text accompanying notes 162-344.

13. See *infra* text accompanying notes 233-76.

14. See *infra* text accompanying notes 314-44.

variant of the disparate treatment model of proving sex discrimination and is designed to respond directly to the twin problems of inadequate pay and unequal access. The focus of litigation under this proposal would be to discover whether the employer purposefully used part-time status as a device to keep the wages of women employees disproportionately low. The plaintiff's prima facie burden would require a showing that the predominantly female part-time work force is paid less than comparably situated full-time workers. In addition to rebutting the plaintiff's claim of job comparability, the employer would be allowed the special defense of proving that it provided adequate opportunities for high paying part-time jobs. This special defense could defeat the claim that part-time status functions to keep female wages low. The proposed allocation of the burden of proof would provide both an incentive for the creation of desirable part-time jobs and a degree of protection against the devaluation of part-time work stemming from sex bias.

I. THE PART-TIME WORK FORCE

A. *Definition of Part-Time Work*

In a society in which the patterns of work are rapidly changing, it is not surprising that there is no single, all-purpose definition of part-time work. Since 1948, however, the Bureau of Labor Statistics has used a standard of thirty-five hours per week to differentiate between full-time and part-time work.¹⁵ Persons working thirty-five hours or more are considered full-time workers; those working thirty-four or fewer hours make up the part-time work force.¹⁶

Within the part-time work force, there are many workers who voluntarily limit their work weeks to fewer than thirty-five hours.¹⁷ These voluntary part-time workers constitute an estimated eighty percent of the part-time work

15. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, Series P-50, No. 3, at 1 (Jan. 21, 1948). It was not until 1930 that the Bureau of the Census began to collect any data on persons not designated as the head of a family. In that year, enumerators were instructed to list any wage-earning homemaker in order to discover "how many women are both homemakers and wage earners." WOMEN'S BUREAU, U.S. DEP'T OF LABOR, THE EMPLOYED WOMAN HOMEMAKER IN THE UNITED STATES—HER RESPONSIBILITY FOR FAMILY SUPPORT, Bulletin No. 148, at 1 (1936).

16. See WOMEN'S BUREAU, OFFICE OF THE SECRETARY, U.S. DEP'T OF LABOR, BULLETIN NO. 298, TIME OF CHANGE: 1983 HANDBOOK ON WOMEN WORKERS 36 (1983) [hereinafter cited as 1983 HANDBOOK]; Hedges & Gallogly, *Full and Part Time: A Review of Definitions*, 100 MONTHLY LAB. REV. 21 (Mar. 1977). Occasionally, other definitions of part-time work are used. See, e.g., Federal Employees Part-Time Career Employment Act of 1978, 5 U.S.C. § 3401 (1982) (16 to 32 hours per week); Hedges & Gallogly, *supra*, at 21 (definition used by International Labor Office is "regular, voluntary employment [carried out] during working hours that are distinctly shorter than normal"). Most of the empirical studies cited in this Article, however, use the thirty-five hour standard in describing the American work force.

17. These voluntary part-time workers should be distinguished from involuntary part-time workers. Persons who work part-time involuntarily are those who desire full-time work but, because of economic conditions, must work fewer than 35 hours a week. The involuntary part-time work force includes persons who settle for part-time work because they cannot find full-time jobs and persons whose hours per week have been reduced from full-time to part-time status. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN NO. 2169, LINKING EMPLOYMENT PROBLEMS TO ECONOMIC STATUS 1, 3-4 (1983) [hereinafter cited as EMPLOYMENT PROBLEMS].

force.¹⁸ The remainder of the part-time work force is underemployed and works part-time involuntarily. This Article is primarily concerned with voluntary, regular part-time workers who are not actively seeking full-time jobs.¹⁹

The group of voluntary part-time workers has grown rapidly since 1954, the first year for which refined data on part-time employment were collected. In 1954, eight percent of all employees were voluntary part-time workers.²⁰ The corresponding figure for 1985 was twelve percent.²¹ The group of voluntary part-time workers ranges from persons who work only a few hours a week up to those who work thirty-four hours per week. In 1977, the median number of hours for adult part-time workers was 19.5 hours per week.²²

B. *Female Character of the Part-Time Work Force*

The one characteristic that stands out in any description of the part-time work force is its predominantly female composition. In 1981 women constituted sixty-nine percent of the part-time work force, compared to only thirty-nine percent of the full-time work force.²³ Looking solely at the voluntary part-time work force, the proportion of female employees is even greater. In 1981 the proportion of women on voluntary part-time schedules was three times as great as the proportion of men.²⁴

Of course, voluntary part-time work is attractive for other classes of employees besides adult women. Many students seek part-time jobs to allow them

18. See Nollen, Eddy, Martin & Monroe, *Permanent Part Time Employment: An Interpretive Review*, in *Hearing on S. 517, S. 518, H.R. 7-814, H.R. 10126 Before the Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 387, 390 (1978) [hereinafter cited as Nollen] ("About 80% of all people working part-time in nonagricultural industries in 1974 were doing so voluntarily."); *EMPLOYMENT PROBLEMS*, *supra* note 17, at 3 (only 25% of wives who worked part-time in 1981 did so involuntarily); 1983 *HANDBOOK*, *supra* note 16, at 36-37 (80% of all women who worked part-time in 1981 did so voluntarily).

19. Regular part-time employment should be distinguished from intermittent and temporary employment. As used in this Article, part-time employment means employment carried out on a regular basis during working hours. In contrast, intermittent employment is employment on an occasional basis; such work is unplanned and unpredictable in regard to both availability and duration. Similarly, temporary employment is employment of a limited, fixed duration, either full-time or part-time. Nollen, *supra* note 18, at 388. Although this Article addresses only regular, voluntary part-time work, much of the discussion may be applicable to temporary and intermittent employment as well.

20. Deutermann & Brown, *Voluntary Part-Time Workers: A Growing Part of the Labor Force*, 101 *MONTHLY LAB. REV.* 3, 4 (June 1978).

21. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *EMPLOYMENT AND EARNINGS* 48 (Oct. 1985).

22. Leon & Bednarzik, *A Profile of Women on Part-time Schedules*, 101 *MONTHLY LAB. REV.* 3, 9 (Oct. 1978).

23. Mellor & Stamas, *Usual Weekly Earnings: Another Look at Intergroup Differences and Basic Trends*, 105 *MONTHLY LAB. REV.* 15, 21 (Apr. 1982).

24. See 1983 *HANDBOOK*, *supra* note 16, at 37 (22% of female workers and 7% of male workers were voluntary part-time workers in 1981); see also *EMPLOYMENT & TRAINING ADMIN.*, U.S. DEP'T OF LABOR, *EMPLOYMENT AND TRAINING REPORT OF THE PRESIDENT* 186 (1983) (in 1981 women represented 70.3% of all voluntary part-time employees); Blumrosen & Culp, *Reducing the Workweek to Expand Employment: A Survey of Industrial Response*, 9 *EMPLOYEE RELATIONS L.J.* 393, 403 (1984) (percentage of male workers with part-time schedules grew only from 10% to 12.1% between 1950 and 1978, but percentage of women workers who worked part-time increased from 26.2% to 32.2%).

to complete their educations.²⁵ Older workers and handicapped employees may prefer part-time schedules to accommodate impaired health or to allow a gradual transition into retirement.²⁶ However, the voluntary part-time work force is still largely the enclave of women, particularly women who care for children.²⁷ For every twenty voluntary part-time workers in 1977, eleven were adult women, four were adult men, and five were teenagers.²⁸ In 1983 the Department of Labor noted that the "general profile" of the part-time worker was that of a woman with school-age children who was married to a full-time worker.²⁹

C. Pay Disparity Between Full-Time and Part-Time Workers

The feminization of the part-time work force is associated with depressed wages, a phenomenon that has recently received much attention with respect to predominantly female full-time jobs.³⁰ Pro rata, part-time workers earn less than their full-time counterparts. In 1981, although part-time employees worked forty-six percent of the hours worked by full-time employees, they earned only twenty-eight percent of the wages earned by full-time employees.³¹ The average part-time worker in 1979 was paid only \$3.12 per hour, compared to \$4.96 per hour for full-time workers.³² Even within the female work force,

25. See S. REP. NO. 1116, 95th Cong., 2d Sess. 6, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 2596, 2601.

26. See *id.*

27. See Greenwald, *Part Time Work*, in WOMEN IN THE U.S. LABOR FORCE 182, 183 (A. Cahn ed. 1979) (approximately one-third of working mothers try to balance work and home responsibilities by working part-time).

28. Leon & Bednarzik, *supra* note 22, at 3; see also Smith, *The Effects of Hours Rigidity on the Labor Market Status of Women*, 11 URB. & SOC. CHANGE REV. 43, 44 (1978) (in 1976 only three in ten male part-time workers were adults under age 55, but six in ten female part-time workers were in this age group).

29. 1983 HANDBOOK, *supra* note 16, at 37-38; see Barrett, *Women in the Job Market: Unemployment and Work Schedules*, in THE SUBTLE REVOLUTION 63, 81 (R. Smith ed. 1979) (among employed married women, those with children under 18 are most likely to work part-time); Leon & Bednarzik, *supra* note 22, at 6 (hypothetical part-time worker is married to a full-time worker and has children who are at least school age); see also EMPLOYMENT & TRAINING ADMIN., U.S. DEP'T OF LABOR, R & D MONOGRAPH NO. 46, WOMEN AND WORK 27 (1977) [hereinafter cited as WOMEN AND WORK] (in 1973, 55% of all part-time female workers had preschool children).

30. For a sampling of the growing literature on the depressed wages of employees in predominantly female jobs, see COMM. ON OCCUPATIONAL CLASSIFICATION & ANALYSIS, ASSEMBLY OF BEHAVIORAL AND SOCIAL SCIENCES, NAT'L RESEARCH COUNCIL, WOMEN, WORK AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE 19-24, 41-42 (D. Treiman & H. Hartmann eds. 1981) [hereinafter cited as WOMEN, WORK, AND WAGES]; M. GOLD, A DIALOGUE ON COMPARABLE WORTH (1983); U.S. COMM'N ON CIVIL RIGHTS, COMPARABLE WORTH: ISSUE FOR THE 80'S 15-18 (1984) (statement of Andrea Beller, Assist. Prof., Univ. of Ill.); Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397, 402-57 (1979) (criticized in Nelson, Opton & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH. J.L. REF. 231 (1980)).

31. Mellor & Stamas, *supra* note 23, at 20-21.

32. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, WAGE AND SALARY DATA FROM THE INCOME SURVEY DEVELOPMENT PROGRAM 1979, at 6 (1982) [hereinafter cited as WAGE AND SALARY DATA]; see also 1983 HANDBOOK, *supra* note 16, at 92 (in 1981, the average male full-time worker earned \$6.25 per hour compared with the average male part-time employee, who earned \$3.20 per hour; the average female full-time worker earned \$3.98 per hour compared with the average female part-time employee, who earned \$3.21 per hour). The near equivalence of pay rates for part-time men and women employees may result from male part-time workers being either "younger-than-average or older-than-average workers." Barrett, *supra* note 29, at 85.

there is a wage gap between part-time and full-time employees. For women with full-time schedules, the median wage in 1983 was \$3.98 per hour, compared with \$3.21 per hour for part-time women workers.³³

The exclusion of part-time workers from important fringe benefits is even more pronounced than the disparity in rates of pay. For example, a 1972 wage survey disclosed that only one-half of the part-time work force received any of the holiday or vacation benefits given to full-time employees.³⁴ Another study in 1982 found that only 18.5 percent of part-time employees received health insurance provided by employers or unions, compared to 74.3 percent of full-time employees.³⁵ The same study revealed that only 11.9 percent of part-time employees were covered by employer or union pension plans, as compared to 53.1 percent of full-time employees.³⁶

The pay disparity between full-time and part-time workers does not stem from any single source. Like the persistent wage gap between male and female full-time employees, the part-time/full-time disparity appears to be a product of several factors, some of which are attributable to sex-based discrimination. The literature on part-time work most frequently cites the following six somewhat overlapping explanations for the pay disparity between full-time and part-time employees.

1. Personal Characteristics of Workers

Part of the pay disparity between full-time and part-time workers may result from the relatively high concentration of teenagers who hold part-time jobs. In 1977 more than half of employed teenagers, both male and female, were voluntarily working part-time.³⁷ Aside from their age, however, part-time workers do not differ appreciably from full-time workers in personal characteristics³⁸ that might justifiably influence wages. Part-time workers are as diverse as full-

33. 1983 HANDBOOK, *supra* note 16, at 92; *see also* Leon & Bednarzik, *supra* note 22, at 10 (in May 1977 female part-time wage and salary workers earned approximately four-fifths as much as full-time female workers); Smith, *supra* note 28, at 44 (women with part-time schedules earn 25% less than women with full-time schedules).

34. WOMEN AND WORK, *supra* note 29, at 27.

35. Hefferan, *Employee Benefits*, 1 FAM. ECON. REV. 6, 10 (1985); *see also* Wambheim v. J.C. Penney Co., 705 F.2d 1492, 1493 (9th Cir. 1983) (medical and dental insurance offered to employees who worked at least 20 hours per week), *cert. denied*, 104 S. Ct. 3544 (1984); Taylor v. Charley Bros. Co., 25 Fair Empl. Prac. Cas. (BNA) 602, 606 (W.D. Pa. 1981) (part-time employee denied fringe benefits given to full-time employee); Nollen, *supra* note 18, at 407 (fewer than 50% of firms surveyed provided part-time employees with supplementary compensation, including health and life insurance and pensions).

36. Hefferan, *supra* note 35, at 10.

37. Deutermann & Brown, *supra* note 20, at 6-7; *see also* 1983 HANDBOOK, *supra* note 16, at 37 (women under 20 years of age are more likely to work part-time than women between 45 and 64). Among males, however, part-time jobs are held primarily by young persons or persons over 65. In 1977, 68% of male part-time workers were under 22 or over 55 years of age as compared with 42% of female part-time workers. Barrett, *supra* note 29, at 85.

38. The voluntary part-time work force contains a somewhat higher percentage of white workers than the full-time work force. In 1977, the proportions of employees working part-time voluntarily were 11% for blacks and 15% for whites. Blacks, however, are about twice as likely as whites to be involuntary part-time workers. Deutermann & Brown, *supra* note 20, at 6.

time employees in education and experience,³⁹ and there appears to be no shortage of part-time workers at any skill level.⁴⁰ One researcher has concluded that part-time workers form a separate, subordinate "queue" in competition with full-time employees and that they can compete successfully "only when they have a distinct edge in education, experience and other personal characteristics that help to predict job performance and training costs."⁴¹

2. Lack of Unionization

Unions in the United States have paid little attention to part-time workers, and the resulting lack of unionization among such workers likely contributes to the pay disparity between part-time and full-time employees.⁴² Only 7.3 percent of part-time workers were union members in 1984, compared with 21.5 percent of full-time workers.⁴³ That unionized work tends to be higher paying is demonstrated by the fact that female part-time workers covered by union contracts earned fifty percent more than nonunionized female part-time workers in 1977.⁴⁴

3. Unequal Pay for Equal Work

A portion of the wage disparity results from part-time workers receiving a lower rate of pay than full-time workers for the same work.⁴⁵ One researcher has observed that the wage rate of women part-time workers is usually lower than that of full-time workers in the same occupation.⁴⁶ Even more significant than the inequity sometimes found in basic wage rates is the exclusion of part-time workers from valuable fringe benefits. Despite some recent statutory reforms,⁴⁷ it appears that only a small minority of part-time workers receive pro

39. Owen, *Why Part-time Workers Tend to Be in Low-wage Jobs*, 101 MONTHLY LAB. REV. 11, 13 (June 1978).

40. See Nollen, *supra* note 18, at 410 ("Employers do not seem to have a problem finding the particular skill needed for a part-time position from among those available to work part time.")

41. Owen, *supra* note 39, at 13.

42. See Nollen, *supra* note 18, at 400-01; Cook, *Introduction to WOMEN AND TRADE UNIONS IN ELEVEN INDUSTRIALIZED COUNTRIES* 9 (A. Cook, V. Lorwin & A. Daniels eds. 1984).

43. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS 208 (Jan. 1985).

44. Leon & Bednarzik, *supra* note 22, at 10-11. In 1977, part-time workers not covered by union contracts earned an average of \$2.90 per hour, and unionized part-time employees earned \$4.31 per hour. *Id.* However, among all workers, sex is more important than union affiliation in determining wages. In 1979, women in unions earned \$4.39 per hour, compared to men, who earned \$7.58 per hour. In the male work force, union members earned 65% more than nonunion members. In the female work force, union members earned only 27% more than nonunion members. WAGE AND SALARY DATA, *supra* note 32, at 5-7.

45. Owen, *supra* note 39, at 12; see also WOMEN AND WORK, *supra* note 29, at 27 (1972 survey found that many part-time workers earned lower hourly wages than employees doing similar full-time work).

46. Smith, *supra* note 28, at 44; see also 1983 HANDBOOK, *supra* note 16, at 92 (in 1979 women full-time workers earned an average of \$3.98 per hour compared with \$3.21 per hour earned by women part-time workers).

47. See, e.g., 5 U.S.C. § 8906(b)(3) (1982) (pro rata health benefits plans for federal part-time employees); OHIO REV. CODE ANN. § 325.19 (Page Supp. 1984) (pro rata vacation time allowed by resolution for part-time employees); *id.* § 3319.14.1 (Page 1980) (pro rata sick leave for part-time school employees).

rata fringe benefits comparable to those of full-time employees.⁴⁸

4. Undervalued Work and Occupational Segregation

The most significant factor in the wage gap between full-time and part-time workers is occupational segregation. Part-time work is concentrated in the wholesale and retail trade and services sectors in which workers tend to be poorly paid.⁴⁹ Almost nine-tenths of all part-time employment is in the services-producing sector, as compared with approximately two-thirds of full-time employment.⁵⁰

The sectors in which part-time opportunities are plentiful also tend to be female-dominated. Predictably, those industries with the largest concentrations of women employees are most likely to employ women for part-time jobs.⁵¹ To an even greater degree than the full-time female work force, the part-time female work force is concentrated in low paying, traditionally female jobs, particularly in the retail and service sectors. One researcher has noted that "over one-third of all women with part-time schedules are employed in food service, retail sales, and private household service occupations."⁵²

Because part-time employees tend to hold traditionally female jobs, they share with their full-time female counterparts the persistent byproduct of sex-based occupational segregation—depressed wages.⁵³ One analysis estimated that two-thirds of the wage gap between full- and part-time workers results from this unfavorable occupational distribution.⁵⁴ Another study estimated that if part-time female workers were to experience only the level of occupational segregation experienced by full-time female workers, over one-third of the wage gap between female part-time and female full-time workers would be eliminated.⁵⁵ Thus, part-time workers have an even greater stake than full-time female workers in devising mechanisms for reducing occupational segregation and providing comparable pay for work of comparable value.

48. See *supra* authorities cited in notes 34-36. Part-time workers also fare poorly when the state provides compensation. The terms and conditions attached to unemployment compensation are structurally biased against women, particularly women on part-time schedules. Pearce, *Toil and Trouble: Women Workers and Unemployment Compensation*, 10 SIGNS, J. WOMEN IN CULTURE & SOC'Y 439, 443-45 (1985).

49. See 1983 HANDBOOK, *supra* note 16, at 37-38 (a general profile of the average female part-time worker would reveal women performing clerical duties or selling); see also *Changing Patterns of Work in America, 1976: Hearings Before the Subcomm. on Employment, Poverty, and Migratory Labor of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. 136 (1976) (most federal part-time workers in 1973 were clerical workers, and few were supervisors or managers); Nollen, *supra* note 18, at 394-400 (discussion of the concentration of part-time workers in the service and manufacturing industries).

50. Mellor & Stamas, *supra* note 23, at 21.

51. See Leon & Bednarzik, *supra* note 22, at 5; Pearce, *supra* note 48, at 445.

52. Smith, *supra* note 28, at 44.

53. For discussions of the relationship between occupational segregation and low wages, see *supra* authorities cited in note 30.

54. Owen, *supra* note 39, at 12.

55. Smith, *supra* note 28, at 44.

5. Paucity of Desirable Part-Time Jobs

In all industries, part-time work tends to be accorded lower status and less compensation than full-time work. When a job demands a high level of skill or supervisory responsibility, the job is not likely to be filled by a part-time worker. In blue collar jobs, the percentage of part-time workers is lowest for skilled occupations.⁵⁶ In white collar occupations, managers are least likely to work part-time.⁵⁷ In 1970 only two percent of part-time women workers were managers or administrators.⁵⁸ This figure is low even compared to the five percent of female full-time workers who held managerial or administrative jobs in 1970.⁵⁹

6. Negative Employer Perceptions

Negative perceptions of the part-time work force on the part of employers contribute to the scarcity of desirable part-time jobs and thus exacerbate the part-time/full-time wage disparity. Employers often stereotype part-time employees as marginal or unnecessary workers, suitable only for entry level or inferior jobs.⁶⁰ This stereotype is reminiscent of views commonly articulated about the female work force, at least until the feminist reforms of the past decade.⁶¹

The scant empirical data available do not adequately explain employers' negative perceptions of part-time employees.⁶² Significantly, employers that do not employ part-time workers tend to have a more negative opinion of the part-time work force than employers that use part-time workers.⁶³ This difference in assessment suggests that the negative perception of part-time workers stems from unsupported fears rather than from bad experiences.

Admittedly, there may be some special costs that are unique to employing part-time workers. Employers now pay a federal social security tax on the first

56. Deutermann & Brown, *supra* note 20, at 8.

57. *Id.*

58. See Leon & Bednarzik, *supra* note 22, at 6.

59. See *id.*

60. See Nollen, *supra* note 18 at 400; S. REP. NO. 1116, 95th Cong., 2d Sess. 1, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 2596, 2599 (discussing Federal Employees Part-Time Career Employment Act of 1978).

61. For discussions of negative stereotypes associated with women workers, see *Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 123-29 (1977) (statement of Wendy Williams, Assist. Prof. of Law, Georgetown Univ. Law Center, Washington D.C.) (cataloging history of stereotypes hampering women workers from 1908 to 1978); A. KESSLER-HARRIS, *OUT TO WORK, A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* 231-36 (1982) (analysis of employer attitudes toward women workers in 1920s); N. MCGLEN & K. O'CONNOR, *WOMEN'S RIGHTS* 224-28 (1983) (discussing cultural stereotypes concerning the abilities of women); Pearce, *supra* note 48, at 443 ("being a wife was prima facie evidence that one was a casual or secondary worker"); Pifer, *Women Working: Toward A New Society*, in *WORKING WOMEN AND FAMILIES* 13, 23 (K. Feinstein ed. 1979) (prevailing belief among employers is that women's work attachment is intermittent).

62. The empirical studies on part-time work are reviewed and analyzed in Nollen, *supra* note 18, in which the authors note that "[t]he empirical evidence comes in the form of a few case studies and surveys of users. Some of the most informative work is European." *Id.* at 388.

63. *Id.* at 400, 402.

\$39,600 earned by each employee.⁶⁴ In the rare case in which an employer uses two part-time employees instead of one full-time employee and the combined part-time workers' salary exceeds the \$39,600 ceiling, the employer's costs will rise. Similar results may occur with respect to state unemployment costs.⁶⁵ However, it is highly unlikely that employers are reluctant to use part-time workers only because of such concrete, additional costs. Instead, many employers, particularly those employers that do not employ part-time employees, have a more negative assessment of the value of the part-time work force than experience warrants.

In some respects, employers regard part-time workers as less desirable than full-time workers when the evidence suggests that part-time workers actually perform better. For example, one study disclosed that employers that do not employ part-time workers generally believe that part-time employees are less productive than full-time employees and have higher rates of absenteeism.⁶⁶ Rather than supporting this negative perception, the available empirical evidence indicates that part-time workers sometimes produce proportionally more than full-time employees and that the quality of work of part-time employees is at least as good as that of full-time employees.⁶⁷ Some commentators have speculated that the superior productivity of part-time workers may be attributable to such factors as less fatigue, ability to maintain a faster pace for a shorter time period, less frustration with tedious or boring tasks, a higher level of concentration for mentally taxing jobs, and strong motivation to complete tasks within prescribed time spans.⁶⁸ Similarly, although there is conflicting evidence, it appears that part-time workers have a lower rate of absenteeism than full-time employees.⁶⁹ This favorable attribute of part-time workers is not surprising because part-time workers have a greater opportunity to attend to personal business during nonworking hours.

Employers expect part-time workers to perform less favorably than full-time workers in other respects even though the evidence indicates that there is no significant difference in performance between the two groups. For instance, many employers believe that part-time workers have high rates of turnover. One study found that two-thirds of employers that did not employ part-time personnel expected turnover rates for part-time workers to be higher than those for full-time employees.⁷⁰ Among employers of part-time employees, however, there was no consensus that part-time workers quit their jobs more frequently than full-time workers.⁷¹

64. 42 U.S.C.A. § 430 (West Supp. 1985).

65. See Nollen, *supra* note 18, at 415.

66. See Nollen, Eddy & Martin, *Permanent Part Time Employment: The Manager's Perspective*, in *Hearing on S. 517, S. 518, H.R. 7-814, H.R. 10126 Before the Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 423, 426 (1978) [hereinafter cited as Nollen II].

67. See Nollen, *supra* note 18, at 409-10; REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON WOMEN & EMPLOYMENT, EXPLOITATION FROM 9 TO 5, at 79 (1975).

68. Nollen, *supra* note 18, at 409.

69. *Id.* at 408.

70. Nollen II, *supra* note 66, at 430.

71. *Id.*

Similarly, employers that do not hire part-time personnel expect training costs for part-time employees to be higher than training costs for full-time employees.⁷² Employers of part-time workers, however, generally report no difference in training costs.⁷³ When there are differences, training costs for part-time workers are as likely to be lower as they are to be higher than those for full-time workers.⁷⁴ The relatively low cost of training part-time workers may result in part from the fact that many part-time workers hold clerical or blue-collar jobs for which little or no training is needed. The point is, however, that employer fears about increased training costs are not supported by available evidence.

Moreover, in those areas in which the use of part-time workers does create added costs, employers tend to exaggerate or overestimate the amount of the additional costs. For example, because of the increase in numbers of employees and greater scheduling complexities, the costs of supervising a part-time work force may be higher than those associated with an exclusively full-time work force. In one study, employers of part-time workers reported that supervision of part-time workers was more difficult in approximately one-half of the cases.⁷⁵ In the remaining cases, employers believed that supervision problems for part-time employees were equivalent to those for full-time employees.⁷⁶ Most importantly, however, very few of the employers that experienced some increased difficulty in supervising part-time workers regarded it as a major cost.⁷⁷ In contrast, nonusers of part-time workers tended both to expect higher supervisory costs for part-time employees and to regard such costs as an important factor in their decisions not to create part-time jobs.⁷⁸ Similarly, approximately one-third of the employers of part-time workers reported increased record keeping difficulties associated with the use of part-time employees.⁷⁹ When the size of a work force increases, more records must be kept, and special records may have to be kept for part-time workers. Only a minority of employers of part-time workers, however, regarded the increased costs of record keeping as significant. In contrast, employers that did not use part-time workers were more likely both to expect increased record keeping costs due to part-time employees and to regard such costs as important.⁸⁰

In addition to overestimating costs, nonusers of part-time employees may not appreciate the potential savings that can accompany the use of part-time personnel. Employers of part-time workers can save the costs of premium over-

72. *Id.* at 437.

73. *Id.*

74. *Id.*

75. *Id.* at 444-45.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 439.

80. *Id.* at 438-39. With respect to two more subjective measures of employee performance, promotability and coworker relationships, part-time workers generally perform as well as full-time workers. *Id.* at 433. However, employers of part-time workers were equally split on the issue of the comparative "loyalty" of part-time and full-time workers. About half the employers surveyed believed that part-time workers were less loyal or committed to the interests of the business than full-time workers. *Id.* at 434.

time pay that ordinarily must be paid to full-time workers.⁸¹ However, employers that do not offer part-time positions tend not to expect savings in overtime pay.⁸²

The studies discussed above suggest that employers' negative attitudes toward the part-time work force cannot be fully explained as a function of verifiable economic costs. The data are inconclusive, however, because it is possible that given the difference in jobs and work environment, the comparatively negative assessment of employers that do not employ part-time workers reflects an accurate prediction in their individual cases.⁸³ Some employers, moreover, may be deterred from creating part-time jobs because of a conservative management style that is generally resistant to change.⁸⁴ In view of the predominantly female character of the part-time work force, however, there is reason to suspect that unproven negative judgments about part-time workers are not traceable solely to economics or other neutral assessments. Instead, the inferior status of part-time work is likely also to be rooted in sexism.

II. FEMINISM AND PART-TIME WORK

A. *Inattention to the Treatment of the Part-Time Work Force*

Our social history should cast a heavy burden of proof on those who blame the character of a group's members for the unequal economic status of any group defined significantly by sex, race, religion, or ethnicity. The part-time work force, which is overwhelmingly female, clearly has been treated less favorably than the full-time work force, which is dominated by men. Existing studies do not adequately explain the unfavorable treatment in rational economic terms. Negative stereotypes of part-time workers abound and apparently inhibit the creation of new part-time jobs. The negative perception of the part-time work force also underlies the relatively poor treatment of existing part-time employees.

It is clear that there is no magic to the forty hour workweek. Since 1920, the number of hours regarded as full-time has dropped appreciably. In the 1920s, for example, it was not uncommon for workers to labor ten hours per day, six days a week. It was only at the height of the Depression that the forty hour maximum workweek was instituted.⁸⁵ One commentator has noted that the only "constant" about the concept of full-time work is that "it is the standard amount of time men work."⁸⁶

Given the pervasive structural hostility to part-time work, it is curious that demands for change in the treatment of part-time workers in this country⁸⁷ have surfaced so infrequently. To date, there has been no significant attempt to use

81. *Id.* at 446.

82. *Id.*

83. *Id.* at 450.

84. See Owen, *supra* note 39, at 13.

85. See Blumrosen & Culp, *supra* note 24, at 410.

86. Greenwald, *Part-Time Work: When Less is More*, 4 MS. MAG. 41, 42 (May 1976).

87. The treatment of part-time workers has received more attention in the European Economic

antidiscrimination laws to challenge either the compensation standards for part-time workers or their lack of access to desirable jobs. Litigants have not yet invoked the principle of comparable worth to secure pay increases for part-time workers, despite the predominantly female character of both the part-time work force and the jobs typically held by part-time workers.

There have been some initiatives outside the courtroom to better the lot of part-time workers and some scholarly interest in the issue.⁸⁸ In the period from 1975 to 1978, there was a flurry of articles by labor economists examining the part-time work force.⁸⁹ The same era spawned modest legislative efforts at the federal⁹⁰ and state levels⁹¹ to encourage part-time work, job sharing⁹² and flexitime.⁹³ But the topic seems to have lost much of its luster in the 1980s. The most recent commentary neither focuses on the part-time work force nor identifies it specifically as a target for feminist reform.

The lull in interest in part-time work likely stems from several sources. In the recent period of high unemployment,⁹⁴ the focus has been on the economic hardships of unemployed full-time workers. In this era, it may appear frivolous,

Community. See Note, *Application of the Laws of the EEC and the United Kingdom to Part-Time Women Workers*, 8 FORDHAM INT'L L.J. 513 (1985).

88. A notable exception to the lack of scholarly interest in part-time work on the part of the legal community is Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U.L. REV. 55, 96-98 (1979) (discussing reformation of part-time work as one desirable change in the labor market structure).

89. See, e.g., Deutermann & Brown, *supra* note 20; Hedges & Gallogly, *supra* note 16; Leon & Bednarzik, *supra* note 22; Owen, *supra* note 39.

90. See, e.g., Federal Employees Part-Time Career Employment Act of 1978, 5 U.S.C. §§ 3401-3408 (1982). The Act requires every federal agency to set annual goals and timetables for establishing part-time career employment positions within the federal civil service. The Act also provides that part-time employees be counted only as fractions of positions for purposes of personnel ceilings. See also 42 U.S.C. § 3056f (1982) (authorizing the appropriation of federal funds to provide part-time career opportunities to low income individuals age 55 and older).

Part-time work also received a boost from former President Carter. In 1976 the President promised that he would "encourage—actively and aggressively—the adoption in the federal government and in the private business sector, of flexible working hours for men and women, and . . . take action to increase the availability of part-time jobs, with proper provision for fringe benefits and job security." Address by President Carter, First Women's Action Agenda, (Nov. 1976), *quoted in* Arkin & Dobrofsky, *Job-Sharing Couples*, in *WORKING WOMEN AND FAMILIES*, *supra* note 61, at 159, 161.

91. For discussions of state legislative reforms, see Arkin & Dobrofsky, *supra* note 90, at 161, and Greenwald, *supra* note 27, at 184.

92. Job sharing is an arrangement by which married or cohabiting couples share the equivalent of less than two full-time positions. Arkin & Dobrofsky, *supra* note 90, at 163.

93. Flexitime permits employees, within designated time periods each day, to choose their starting and ending times at their own discretion. Polit, *Nontraditional Work Schedules for Women*, in *WORKING WOMEN AND FAMILIES*, *supra* note 61, at 195, 199. A 1977 American Management Association survey estimated that 12.8% of all private sector organizations use flexitime. 1983 HANDBOOK, *supra* note 16, at 38. In 1979 Congress authorized federal agencies to experiment with flexible work schedules, including a four day workweek. Act of Sept. 29, 1978, Pub. L. No. 95-390, 1978 U.S. CODE CONG. & AD. NEWS (92 Stat.) 755, 755-60 (codified in notes following 5 U.S.C. § 6101 (1982)). Based on the positive results of these experiments, Congress enacted legislation in 1982 that permits federal agencies to use flexible and compressed employee work schedules on a nonexperimental basis for three years. See 5 U.S.C. §§ 6120-6126 (1982).

94. In April 1983 10.3% of all civilian workers were unemployed. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS, vol. 30, no. 4, at 60 (Apr. 1983). Part-time workers suffer higher levels of unemployment than full-time workers. Pearce, *supra* note 48, at 447.

or at least politically unwise, to press for improved opportunities for part-time workers when the principal segment of the work force has fared so poorly.

The conservative political climate of the Nation has also inhibited affirmative action for part-time workers in this decade. Although the 1984 platform of the Democratic party called for the creation of "meaningful part-time work,"⁹⁵ the speeches of party leaders embraced the work ethic with a vengeance. Vice-presidential nominee Geraldine Ferraro described the American dream as a guarantee that "[i]f you work hard and play by the rules, you can earn your share of America's blessings."⁹⁶ The same sentiment was echoed by keynote speaker Mario Cuomo, recounting the saga of his immigrant father who, with calluses on both hands, worked fifteen to sixteen hours a day.⁹⁷ This appropriation of the work ethic by liberal reformers carries a significant backfire potential. Employers are likely to find reinforcement for the belief that a hard day's work is morally enriching as well as economically profitable. The danger for part-time workers is that if the work ethic is too narrowly defined, they may find themselves regarded as only half as worthy as their full-time counterparts. The backfire potential results from reinforcement of the stereotype that all part-time workers lack the ambition and drive needed to become truly successful.

These unfavorable economic and political forces, however, do not explain why equity for part-time workers has not emerged as a significant component of the current pay equity or comparable worth movement. Instead, the dormancy of the part-time work issue requires a more particularized explanation, focusing on why part-time work has not attained a high priority even on the feminist reform agenda.

In the public consciousness, the treatment of part-time workers has not been clearly linked to equal rights for women workers. Despite the similarity between the negative stereotypes associated with part-time workers and the discredited stereotypes that have hampered women workers generally, acceptance of the view that part-time status alone justifies unfavorable treatment remains widespread. The most striking example of the unquestioned acceptance of discrimination against part-time workers is the Department of Labor's creation of a special exception to the strictures of the Equal Pay Act.⁹⁸ Under this exception, employers may pay employees who work twenty or fewer hours a week at a lower rate of pay than the rate paid to full-time employees doing identical work.⁹⁹ Under this system, part-time status automatically justifies unfavorable treatment, regardless of the productivity or qualifications of part-time employees.

Two factors likely account for the failure of the public and the legal com-

95. Democratic Party Platform, 1984 CONG. Q. 549, 1767 (1984).

96. Address by Congresswoman Ferraro, Democratic National Convention (July 19, 1984), reprinted in 1984 CONG. Q. 655, 655 (1984).

97. Address by Governor Cuomo, Democratic National Convention (July 16, 1984), reprinted in 1984 CONG. Q. 1781, 1784 (1984).

98. See Dep't of Labor Interpretative Bulletin, 29 C.F.R. 800.150 (1982) (discussed *infra* notes 176-78 and accompanying text).

99. See *id.*

munity to regard discrimination against part-time workers as sexism. First, attitudes toward part-time workers mirror attitudes toward working mothers. Despite recent gains made by women in the job market, the workplace remains unreceptive to working mothers. Second, feminists, union leaders, and others interested in liberal reform are often ambivalent about encouraging the growth of part-time employment. Their ambivalence stems from the fear that the part-time work force will always retain its minority, second-rate status and will only perpetuate the inferior position of women workers.

B. *Working and Motherhood: Perceptions of Incompatibility*

The typical female part-time worker is neither fish nor fowl. She is by definition squarely in two worlds: she is simultaneously a homemaker and an employee. Although not all voluntary part-time workers are working mothers, in the popular consciousness, the part-time worker is a mother whose husband works full-time.¹⁰⁰

The association of part-time workers with married women, particularly working mothers, is rooted in history. An early article in the *Monthly Labor Review* described the considerable debate about the desirability of creating part-time jobs for women workers at the close of World War I.¹⁰¹ At that time, there was particular concern for "the partly occupied woman, the married woman especially, whose home duties do not occupy her full time but do prevent her from conforming to the industrial time-table."¹⁰²

Given this image of the part-time worker as a "partly occupied" housewife, it is not surprising that part-time status has been considered marginal or inferior. Resistance to the view that part-time workers are entitled to rights equal to those of their full-time counterparts may be traced to a widespread perception that work within the home (housework) and work done outside the home for compensation (outside work) are fundamentally different and incompatible.

The dichotomy between housework and outside work is part of a larger social perception that draws a sharp line between the public and the private domains. Contemporary feminist scholarship has examined the mechanisms by which this ideological division between public and private spheres reinforces the social inequality of women.¹⁰³ One characteristic of the public/private split is a perceived difference in modes of interpersonal interaction. Professor Frances

100. See *supra* authorities cited in note 29.

101. *Women in the Modern World*, in ANNALS OF THE AM. ACAD. OF POL. & SOC. SCIENCE (Bureau of Women in Industry of New York, May 1929) (reprinted in *Women in Industry—Part-Time Jobs for Women*, 1929 MONTHLY LAB. REV. 1259) [hereinafter cited as *Women in Industry*].

102. *Id.* The article acknowledged, however, that other classes of employees might benefit from part-time employment, including "single women with household duties which do not fill their time, students working their way, women whose health does not permit full employment, and those who already have one part-time job and want another to supplement it." *Id.*

103. See, e.g., Z. EISENSTEIN, FEMINISM AND SEXUAL EQUALITY 32-34 (1984); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1501-13 (1983); Polan, *Toward a Theory of Law and Patriarchy*, in THE POLITICS OF LAW 294, 298-300 (D. Kairys ed. 1982); Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination*, 1979 WIS. L. REV. 55, 70-102; Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, in THE POLITICS OF LAW, *supra*, at 117, 118-39.

Olsen has observed that the public sectors of the market and government are generally thought to be animated by individualistic, self-interested behavior in which the common good is to be achieved by individuals striving to get ahead. In the public world, competition is the key to success.¹⁰⁴ In marked contrast, the private world of the family is characterized by cooperation rather than competition. The "successful" family member sacrifices his or her own desires for the good of other family members and derives principal satisfaction from sharing rather than from eliminating competitors.¹⁰⁵ These patterns of sharing and cooperation that characterize the family have been linked to a mode of behavior said to reflect a distinctive female morality.¹⁰⁶

This social perception of the dichotomy between public and private life pressures each working woman to choose whether to be a "career woman" or a "working mother." These descriptive titles suggest the relative dominance given to the public or private sphere in the individual woman's life. The career woman may have a husband and children, but she places her job first and, by definition, is a full-time worker. The working mother, as her title suggests, is a mother and wife first and foremost. She works only to supplement the family income, to relieve boredom, or to sharpen her skills for the future. Her commitment to the job is seen as divided and lukewarm. She may work full-time or part-time. If she works full-time, she likely works in a traditionally female job.

All part-time workers are lumped into this second, "working mother" category. The very choice to work part-time excludes a total commitment to the job. This rigid conception means that a "part-time career woman" is simply an impossibility.

Likewise, in this traditional conception of home and work, there is no such creature as the "working father." It is simply not acceptable for a man to work part-time voluntarily. There is no need for the term "career man." To be a man is to put the job first and family concerns second. All working men are career men in this simplistic scheme.

This traditional sex-based conception of the home and of compensated work done outside the home is reflected in the data generated by opinion polls measuring the public's attitudes about the employment of married women. Although public attitudes have fluctuated somewhat over time, there is a persistent double standard in the public's view of the proper role of married men and married women in the workplace.

In their book, *Women's Rights*,¹⁰⁷ Professors Nancy McGlen and Karen O'Connor summarize extensive public opinion data. Essentially, the data reveal that the once generalized hostility toward married women working outside the home has decreased markedly. A more refined double standard, however, has

104. See Olsen, *supra* note 103, at 1520-21.

105. *Id.* at 1505.

106. See generally C. GILLIGAN, IN A DIFFERENT VOICE (1982) (in resolving moral questions women often focus on care and responsibility toward others); *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFFALO L. REV. 11, 37-49 (1985) (panel discussion) (elaborating on Gilligan's thesis).

107. N. MCGLEN & K. O'CONNOR, *supra* note 61.

emerged. The current majority opinion now acknowledges the right of a married woman to work outside the home but only if her employment does not conflict with the perceived needs or interests of her husband or young children.¹⁰⁸

Until fairly recently, there was widespread hostility toward married women working outside the home under any circumstances.¹⁰⁹ Resentment and disapproval of working wives reached a high point during the Depression. One historian describes that era as a time when "[t]he question of whether the roles of worker and of wife/mother were not mutually exclusive was on everybody's lips."¹¹⁰ In 1936 only fifteen percent of the public unqualifiedly endorsed married women working.¹¹¹ At that time, there was considerable support for the practice of firing or refusing to hire women who could look to their husbands for support.¹¹² For example, over half the respondents in one study favored legislation prohibiting married women from working for state or local governments if their husbands earned at least \$1000 a year.¹¹³

During World War II, there was much greater support for the employment of married women. The public approval of married women working, spawned by the war, however, was temporary and dissipated in the immediate post-war era.¹¹⁴ Public opinion remained similar to public opinion before the war—only eighteen percent of those polled in the immediate post-war era gave unqualified support to the employment of married women if their husbands could support their families.¹¹⁵

Although large numbers of married women entered the work force in the 1950s,¹¹⁶ attitudes concerning the employment of married women did not begin to change until the late 1960s. Changed economic needs and the rebirth of the women's movement fostered more liberal attitudes toward married women and work. In 1969 over half the persons surveyed approved of married women earning money outside the home.¹¹⁷ By the late 1970s, the vast majority of the public had accepted a married woman's right to work outside the home, even if her husband were capable of supporting her.¹¹⁸

108. See Levin, *Comparable Worth: The Feminist Road to Socialism*, 14 COMMENTARY 13, 15 (1984).

109. As one early commentator observed:

First, it is said that a married woman's place is in her home, that if she takes outside work she must inevitably neglect either the home or the business, and that having elected matrimony, it is obligatory upon her to fulfill the duties of that estate, leaving the pursuit of economic independence to her unmarried sisters.

Women in Industry, *supra* note 101, at 1262.

110. A. KESSLER-HARRIS, *supra* note 61, at 255.

111. N. MCGLEN & K. O'CONNOR, *supra* note 61, at 215.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 215-16.

116. See *id.* at 167, 216 (demand for women workers during this period was too great to be filled by single women alone).

117. See *id.* at 217 ("[B]y 1969, 55 percent of all respondents approved of a married woman earning money in business or industry, an increase of 37 percent since 1945.").

118. *Id.*

Despite increased support for married women's employment, the public continues to adhere to a double standard that discriminates against two subclasses of married women. First, when the career interest of a married woman is pitted against that of her husband, the public continues to view the man's interest as superior. The most recent polling data for 1985 revealed that seventy-two percent of all women and sixty-two percent of all men believed that a woman should quit her job if her husband were offered a very good job in another city.¹¹⁹ However, if a woman were offered a better job in another city, over one-half of the respondents believed that she should refuse the job and stay in her present location to allow her husband to remain in his job.¹²⁰

Professors McGlen and O'Connor inferred from similar results in public polling data generated in the late 1970s¹²¹ that "most people still believe that a married woman should accept a job outside of the home *only* if she is not taking a job away from a man."¹²² For example, when respondents in a 1977 poll were told that there was a "limited number of jobs," sixty-four percent disapproved of a married woman holding a job if her husband could support her.¹²³ In a similar vein, a 1976 poll revealed that over one-third of the respondents favored laying off married women before other employees.¹²⁴

In addition to regarding a husband's career as more important than that of his wife, the public views the employment interests of married women as subordinate to the interests of their young children. In 1978, for example, only twenty-three percent of the public disagreed with the statement that women with young children should not work outside the home unless it were financially necessary.¹²⁵ The hostility toward mothers of young children working is partly explained by the perception that young children are hurt when their mothers work. In 1977 seventy-three percent of all men interviewed and sixty-two percent of all women interviewed felt that preschool children suffered if their mothers worked.¹²⁶

119. *Opinion Roundup*, PUB. OPINION, Dec.-Jan. 1986, at 26. The same poll revealed that only 10% of women and 19% of men believed that a husband should refuse a very good job in another city to enable his wife to remain in her present job. *Id.*

120. *Id.*

121. In 1979 77% of all women and 68% of all men believed that a woman should give up her career if her husband were required to relocate. Two-thirds of the respondents in another poll believed that a woman should give up a promotion if it would require the spouses to relocate. N. MCGLEN & K. O'CONNOR, *supra* note 61, at 218.

122. *Id.* at 217.

123. *Id.*

124. *Id.* at 217-18.

125. *Id.* at 222.

126. *Id.* Similarly, in a 1984 poll 55% of the respondents believed that if both parents work, the family generally suffers. *Opinion Roundup*, *supra* note 119, at 31.

There is a great gulf between public opinion and reality regarding the employment of mothers of preschool children. A high percentage of mothers with preschool children work. "The largest proportional increases in labor force participation have occurred among mothers with children under six years old." U.S. COMM'N ON CIVIL RIGHTS, CHILD CARE AND EQUAL OPPORTUNITY FOR WOMEN 8 (1981) (quoting CONGRESSIONAL BUDGET OFFICE, U.S. CONGRESS, CHILDREN AND PRESCHOOL: OPINIONS FOR FEDERAL SUPPORT 44 (1978)) [hereinafter cited as CHILD CARE AND EQUAL OPPORTUNITY]. From 1970 to 1981, the labor force participation rates of married mothers with children under six years of age increased from 30% to 48%, a greater increase than

Like most sex-based stereotypes, the double standard applied to working mothers and fathers is reinforced by the real world. There is evidence indicating that it indeed may be more difficult for a woman to manage a job and a family than it is for a man. The feminist movement has not yet freed women from shouldering a disproportionate burden of both housework and childrearing responsibilities. In a 1985 poll, men and women agreed that husbands only rarely did as much or more household work as their wives.¹²⁷ One study found, for example, that women with outside jobs devoted an average of twenty-eight to fifty-six hours per week to housework and child care.¹²⁸ In contrast, men spent only an average of ten and one-half hours per week performing these services.¹²⁹ Because women spend more time cooking,¹³⁰ cleaning, caring for their children, and shopping for their families, they may have less time available for working.¹³¹ A report of the United States Civil Rights Commission indicated, for example, that twenty-three percent of working mothers reported that inadequate child care arrangements caused them to miss or be late for work. Few fathers complained of the same problem.¹³²

Because the female part-time worker presumably has more flexibility to arrange her schedule to accommodate family responsibilities, she should be less subject to charges of conflicting loyalties than her full-time counterpart. However, this logic has not dispelled negative perceptions about part-time workers. Indeed, part-time workers may be more vulnerable to sex-based discrimination than full-time female employees. This is the case because the feminist movement and the laws prohibiting sex discrimination in employment have had at least one important impact: it is no longer respectable for an employer openly to assert that a woman will be a less productive worker simply because she is a woman, or is married, or has children. As yet, however, this chilling effect has not filtered

that for mothers with school-age children. 1983 HANDBOOK, *supra* note 16, at 17. There is no convincing evidence that children usually suffer because their mothers work. See Moore & Hofferth, *Women and Their Children*, in THE SUBTLE REVOLUTION, *supra* note 29, at 125, 143-52 (because children, families, and types of day care vary widely, the effect of substitute care on children depends on several factors); Smith, *The Movement of Women into the Labor Force*, in THE SUBTLE REVOLUTION, *supra* note 29, at 1, 24 ("Overall the evidence does not suggest that day care harms children.").

127. Only 15% of the women and 23% of the men surveyed reported that men performed at least half of the household tasks. *Opinion Roundup*, *supra* note 119, at 30.

128. Law, *Women, Work, Welfare and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1331 (1983) (citing Walker & Gauger, *The Dollar Value of Household Work*, NYS SCH. OF HUMAN ECOLOGY, CORNELL UNIV. INFORMATION BULL. 60 (1973)); see also N. MCGLEN & K. O'CONNOR, *supra* note 61, at 350-52 (reviewing empirical studies and attitudes toward sharing of tasks between men and women); Hofferth & Moore, *Women's Employment and Marriage*, in THE SUBTLE REVOLUTION, *supra* note 29, at 99, 115 (noting that when both partners work full-time, the workweek of wives, including jobs and housework, averages 66 to 75 hours and exceeds that of husbands by about 8 hours).

129. Law, *supra* note 128, at 1331.

130. A 1984 survey found that men are the primary cooks in only 4% of American households and cooking is shared equally in 15% of households. In households with children, men are primary cooks in only 2% of the cases and cooking is shared equally in 24% of the cases. N.Y. Times, Feb. 12, 1986, at C8, col. 3.

131. See discussions of women's double burden in N. MCGLEN & K. O'CONNOR, *supra* note 61, at 241, and Powers, *supra* note 103, at 86.

132. CHILD CARE AND EQUAL OPPORTUNITY, *supra* note 126, at 12 (discussed in Law, *supra* note 128, at 1310).

down to salvage the image of the part-time worker. Because overt prejudice against part-time workers is not clearly associated with sexism, it has not lost its respectability.

Perhaps adverse treatment of part-time employees has not been linked to sexism because male part-time workers have also been disadvantaged. The fact that discriminatory treatment of part-time workers does not have its sole impact on women, however, does not render such discrimination gender-neutral. Our understanding of the complex mechanisms by which the system-wide inequality of women is maintained now includes the recognition that many harmful sexist practices and institutions may directly and simultaneously disadvantage men as well as women. Thus, for example, a series of United States Supreme Court decisions invalidated social security and other benefit schemes that accorded less protection to the male survivors of women workers than to the surviving wives of similarly situated deceased male workers.¹³³ These schemes were recognized as double-edged swords, discriminating simultaneously and directly against deceased women workers and their surviving husbands.¹³⁴ Moreover, it is now commonly acknowledged that the low wages and low status traditionally associated with predominantly female occupations and jobs harm men as well as women who work in those fields.¹³⁵ A particularly interesting example of this phenomenon can be found in the academic world, in which scholarship in women's studies is downgraded and viewed as less acceptable even when pursued by a male scholar or teacher.¹³⁶ Thus, in practical operation, sexist practices may not be refined so as to target women as the only direct victims. Certain men may also be disadvantaged by the sexist structure of the workplace.¹³⁷

The low status of the part-time worker is likely related to the low value our society places on housework and child care.¹³⁸ Because the stereotypical female

133. See *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (workers' compensation); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (social security); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (social security); cf. *Orr v. Orr*, 440 U.S. 268 (1979) (invalidating law authorizing payment of alimony to women only).

134. For general discussions of the benign sex discrimination cases, see Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 CONN. L. REV. 813 (1978); Kanowitz, *"Benign" Sex Discrimination: Its Troubles and Their Cure*, 31 HASTINGS L.J. 1379 (1980).

135. The National Research Council estimated that men doing "women's work" could expect to earn nearly \$3,000 less per year than men doing "men's work." WOMEN, WORK AND WAGES, *supra* note 30, at 28-29 n.13. Moreover, the more intensely the occupation was dominated by women, the greater the disparity in wages for both men and women workers. The National Research Council study estimated that each additional percent of female workers in an occupation costs male workers about \$30 in annual income. *Id.* However, even in female-dominated occupations, men tend to earn more than women. Rytina, *Earnings of Men and Women: A Look at Specific Occupations*, 105 MONTHLY LAB. REV. 25, 26-28 (Apr. 1982).

136. In *Lynn v. Regents of the Univ. of Cal.*, 656 F.2d 1337 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982), a female professor challenged a denial of tenure based on an alleged deficiency in her scholarship in women's studies. *Id.* at 1344. The district court determined that the peer criticism of Lynn's work reflected a "disdain" for women's studies which might have been prompted by a belief that "woman's [sic] studies was an unworthy topic to pursue." *Id.* at 1343.

137. Similarly, it is evident that discrimination against racial minorities may harm a subclass of whites. The theory underlying disparate impact analysis in Title VII litigation implicitly recognizes that discriminatory practices may disadvantage individuals of the majority group. Many selection devices that are invalid because of their disproportionate harm to blacks operate as barriers to individual whites as well.

138. See, e.g., Hauserman, *Homemakers and Divorce: Problems of the Invisible Occupation*, 17

part-time worker spends part of her day on domestic chores, she may be tainted at work because of what she does at home. As long as domestic work is not seen as productive, worthy of pay, or intellectually or physically taxing, its low social worth stigmatizes the homemaker, even when she is employed at an outside job. The employer is unlikely to believe that it will benefit from the domestic experiences of part-time workers. Moreover, the employer may regard the part-time worker as suitable only for jobs that most resemble housework and child care. This enforced compatibility between outside work and work done at home may well justify placement of part-time workers into low-skilled, boring, traditionally female jobs.¹³⁹ Moreover, insofar as family life is viewed as anticompetitive and communal, the working mother may be regarded as psychologically unready to compete in the marketplace. Until the working mother sheds her association with the home by agreeing to work full-time, she may be hampered by belittling conceptions of her life away from the job.

C. *Perpetuation of Male Dominance in the Two-Parent Family*

Discrimination against part-time workers may properly be viewed as sexist because of its capacity to perpetuate male dominance in two-parent homes. The typical part-time working mother may be kept in a subordinate economic position by a workplace that is inhospitable to part-time workers. Unless she is willing and able to work full-time, there is little chance that she will achieve economic parity with her husband. Spouses are unlikely to decide that they will each work part-time and share child care and other domestic work equally. Equally slim is the possibility that the man will opt for part-time work and the woman will maintain a full-time job. Instead, the marketplace is structured to induce the woman in the two parent family to be the sole part-time worker. Men typically earn much more than their wives when each is a full-time worker.¹⁴⁰ Thus, it is rarely rational for a husband to give up his full-time job. Moreover, because part-time workers receive low pay,¹⁴¹ the price a man pays for switching to part-time work includes the premium he formerly received as a full-time male worker. Thus, a male worker who decides to work part-time receives the same unfavorable treatment as a female part-time worker and loses the edge given his sex in the marketplace. Finally, the social prejudice against "househusbands" likely presents a formidable obstacle to men working part-time, even when the family income would not suffer dramatically from this

FAM. L.Q. 41, 43-44 (1983) (inability to ascertain economic value of a homemaker's activity results in minimization of the value of her work effort); Hauserman & Fethke, *Valuation of Homemaker's Services*, 1978 TRIAL LAW. GUIDE 249, 250 (noting possible reluctance to assign a monetary value to a mother's services in a wrongful death action); Nelson, *The Unpriced Services of the Unpaid Homemaker*, 52 AM. VOCATIONAL J. 36, 36-38 (Oct. 1977) (dollar value of household work ignored when determining GNP).

139. See C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 9-12 (1979).

140. See CONSUMER RESEARCH CENTER, *THE WORKING WOMAN—A PROGRESS REPORT* 6-7 (1984) (working wives contribute a little over a quarter of the family's total income); see also 1983 HANDBOOK, *supra* note 16, at 92 (in 1979 male full-time workers earned an average hourly wage of \$6.25, compared with \$3.98 for female full-time workers).

141. See 1983 HANDBOOK, *supra* note 16, at 92 (in 1979 male part-time workers earned \$3.20 per hour compared with \$3.21 per hour earned by female part-time workers).

choice.¹⁴² It is now recognized that work done in the home is undervalued and that women who work at home and care for children are frequently dismissed as economic inferiors. The reputation of househusbands may be even worse. For example, one study of attitudes among high school seniors revealed that, even among those who indicated support for the employment of married women, only a few found it as much as "somewhat acceptable" for a husband not to work or to work only part-time, even if his wife was employed.¹⁴³ These economic and social pressures tend to preserve the predominantly female character of the part-time work force, increasing the chance that even the employed woman will remain economically dependent on her husband.

That the low status of part-time workers contributes to the economic subordination of wives living with their husbands seems characteristic of the second generation of sexism. In the first generation, explicit disparate treatment of all women workers was justified as the natural order of things. Although the old sexist notions have been discredited and explicit sex-based discrimination has decreased, the system of male dominance has not been seriously undermined. Today the system tolerates and purports to treat equally those career women who declare themselves independent and enter the marketplace on ostensibly the same terms and conditions as men. However, when the employed woman deviates from the male norm, for example, by working at a traditionally female job or working only part-time, her second class status is likely to persist. The public opinion data surveyed above¹⁴⁴ concerning attitudes towards employment of married women support this observation. Although the undifferentiated hostility toward the employment of married women has decreased, the public continues to subordinate the interests of married women to those of their husbands and young children. Being married may no longer automatically deprive a woman of equal rights in the workplace, but the position of certain subclasses of married working women remains precarious because their interest in employment is viewed as less weighty than that of other workers.

The prejudice against part-time workers thus may stem from a more subtle sexist attitude that, without purporting to denigrate women per se, discounts and devalues the interests of women who are viewed as competing with men. Insofar as the part-time worker is equated to the working mother whose husband is employed full-time, the unfavorable treatment of the part-time worker is discounted as relatively harmless on the ground that the family suffers less when discrimination is directed at the secondary, rather than at the primary, breadwinner. By classifying part-time workers as second string employees, disparate treatment is justified on a superficially neutral basis. According second-class status to part-time workers also ensures that they do not attain the status of primary or even equal breadwinners entitled to equal respect. A woman who decides to work part-time effectively loses her right to claim equal treatment.¹⁴⁵

142. See Greenwald, *supra* note 27, at 185 (not yet "socially acceptable" for men to work part-time).

143. N. MCGLEN & K. O'CONNOR, *supra* note 61, at 224.

144. See *supra* notes 108-26 and accompanying text.

145. A similar "sophisticated" pattern of second generation sexism has been researched and

In addition, discrimination against part-time workers protects male dominance in the home. Single mothers rarely have the luxury of working part-time.¹⁴⁶ A woman living with her husband is a likely candidate for part-time work and thus a likely candidate for discrimination. Discrimination against part-time workers targets an important subclass of women who are rendered incapable of attaining economic independence and thus must continue to depend on their husbands' jobs. Discrimination against part-time workers keeps wives in a subordinate economic position in an era in which overt sex discrimination is widely condemned.

D. *Debating Strategies for Reform*

The inferior status of part-time workers is part of the larger problem of the inferior position of women workers in the hierarchy of the workplace. Reform efforts designed to better the lot of women workers will almost invariably have a positive impact on the predominantly female part-time work force. Thus, the basic strategic question is whether to focus on part-time work directly as a target for reform.

The benefits of such a direct strategy, if successful, are self-evident. First, women currently holding part-time jobs would receive increased pay and expanded fringe benefits. Second, women currently not in the labor force because of the scarcity of part-time jobs could find suitable part-time work. Third, women working full-time "involuntarily" could switch to part-time schedules and have more time for parenting or other tasks. Last, men who work full-time or are unemployed might find it feasible and desirable to work part-time and participate more fully in childrearing and other activities. The ultimate goal of such a strategy would be to upgrade and sexually integrate the part-time work force. The principal beneficial byproducts of such reform would be to encourage men and women to share domestic responsibilities equally and to weaken the male's traditional dominance in the marital relationship.

A direct strategy to reform part-time work, however, has significant backfire potential.¹⁴⁷ The danger stems from the reality that part-time work, like traditional female work, is characterized by low pay and low status. Moreover,

analyzed by Professor Sylvia Law. See Law, *supra* note 128. In her article, Professor Law made sense of a perverse federal regulatory scheme that required single mothers of school age children receiving Aid to Families with Dependent Children (AFDC) to seek work outside the home. Act of June 9, 1980, Pub. L. No. 96-265, 94 Stat. 441, 460-62 (1980) (codified at 42 U.S.C. § 602(a)(19)(A)), amended by Act of Aug. 13, 1981, Pub. L. No. 97-35, § 2314, 95 Stat. 854, 854-55 (1981) (codified as amended at 42 U.S.C. § 607 (1982)). The law exempted AFDC mothers from having to seek outside work if their husbands lived with them. The "sense" of the system was that women were freed to take care of their husbands in the home and thereby encouraged not to work when the "primary breadwinner" was present. Professor Law explained that single mothers did not get similar encouragement, simply because when "there is no man in the home, there is no need to protect his economic dominance." Law, *supra* note 128, at 1266.

146. Of the widowed, divorced, or separated women who worked in 1981, 13.5% worked part-time voluntarily, compared with 80% who worked full-time. 1983 HANDBOOK, *supra* note 16, at 37. Of the employed married women with husbands present in 1981, 24% worked part-time voluntarily, compared with 70.8% who worked full-time. *Id.*

147. See Arkin & Dobrofsky, *supra* note 90, at 174 (feminists fear that part-time work is potentially destructive of women's efforts for equal employment).

despite its overwhelmingly female composition, the part-time work force comprises only a minority of women workers. Most women workers work full-time.¹⁴⁸ Thus, reforms targeted at the part-time work force affect only a minority of women workers whose place in the hierarchy of work is particularly low.

The problems of predominantly black colleges and universities provide a useful analogy to the problems of the part-time workforce.¹⁴⁹ Predominantly black educational institutions typically suffer from low prestige in academic circles and may not attract large numbers of nonminority students.¹⁵⁰ Despite the significant impact these schools have on the lives of minority students, some civil rights proponents argue that reform efforts directed at predominantly black institutions are futile and ultimately self defeating.¹⁵¹ The principal strategy for ending racial discrimination has been to encourage minority students to attend formerly white institutions and to put pressure on these institutions to create an environment that is hospitable to minority students. Given limited resources, it may be more efficient to reshape the dominant institutions than to upgrade the minority institutions. If the segregated character of a minority institution is partly responsible for its low status, there is a danger that reforms will not succeed in changing the racial character of the school and, at most, will bring limited, temporary gains to students currently enrolled.

Efforts to reform part-time work involve similar problems. If such efforts are limited to upgrading the pay of part-time workers, the most serious concern is that the efforts may result in a shrinkage of part-time opportunities.¹⁵² If reforms are designed both to upgrade pay and to encourage the creation of new part-time jobs, the success of the strategy will depend on two variables: the kinds of new part-time jobs created and the response of male workers to these new part-time opportunities. In the worst scenario, the net effect of reform would result only in the creation of additional, relatively low-paying part-time jobs in traditionally female fields. Because few male workers would accept such

148. Of all female employees in all occupation groups in 1981, 71.8% worked full-time, and 28.2% worked part-time. 2 BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN 2163, MARITAL AND FAMILY PATTERNS OF WORKERS: AN UPDATE (May 1983).

149. The popularity of historically black colleges has declined in recent years. The percentage of black students attending these schools dropped from 51% in 1964 to 18% in 1976. H.E.W. NAT'L ADVISORY COMM. ON BLACK HIGHER EDUC. & BLACK COLLEGES & UNIVS., HIGHER EDUCATION EQUITY: THE CRISIS OF APPEARANCE VERSUS REALITY 13 (1978).

150. The typical traditionally black college has a nonminority enrollment of approximately 28%. See NAT'L ADVISORY COMM. ON BLACK HIGHER EDUC. AND BLACK COLLEGES & UNIVS., NEEDED SYSTEMS SUPPORTS FOR ACHIEVING HIGHER EDUCATION EQUITY FOR BLACK AMERICANS 190-93 (1980) (state and regional statistics).

151. *But cf.* Bell, *Black Colleges and the Desegregation Dilemma*, 28 EMORY L.J. 949, 962 (1979) (disagreeing with reformers who conclude that black colleges are "inconsistent with the ideal of a racially integrated society").

152. The argument is commonly made that the marketplace resists reform efforts, resulting in worsened circumstances for the disadvantaged. See Olsen, *supra* note 103, at 1503 (discussing twin arguments that the market will resist reforms, either because of its fragility or its durability). Opponents of the Equal Pay Act expressed a similar fear, claiming that granting equal pay to full-time women workers would worsen, rather than improve, job opportunities for women. See H.R. REP. NO. 309, 88th Cong., 1st Sess. 10, reprinted in 1963 U.S. CODE CONG. & AD. NEWS 687, 692 (additional minority view of Congressman Findley). Congressman Findley opined that "[a]lthough [the Equal Pay Act] may have motives in the finest tradition of gallantry, it actually is about as ungallant as a kick in the shins." *Id.*

jobs, part-time work would likely remain women's work. If this were the case, the workplace might become even more deeply segregated by sex.

Aside from the fear of deepening segregation, an increase in part-time jobs could conceivably pose a threat to the full-time work force. In the past, union leaders have been reluctant to endorse the creation of new part-time jobs.¹⁵³ Unions fear that an increase in part-time jobs could depress the wages of full-time workers and that, in times of high unemployment, part-time workers could take jobs away from full-time workers.¹⁵⁴ Looking at the part-time work force as a source of cheap, docile labor, the unions' chief concern is with possible exploitation of this growing labor market by management.

Finally, there is a danger that the availability of increased part-time opportunities for women workers might reinforce societal attitudes that women should have primary responsibility for child care and housework and should not be expected to devote the same time and effort to careers as do men. As long as the part-time work force remains predominantly female, employers and others may be led to believe that only women experience conflicts in carrying out their domestic and career roles.

As the preceding discussion indicates, the part-time work problem is complex. Simply expanding the number of part-time jobs will do little to better the position of women in the labor force.¹⁵⁵ To be effective, a reform strategy must address the quality as well as the quantity of part-time opportunities. Upgrading pay and fringe benefits in current part-time positions is one obvious target of reform. The creation of new part-time jobs in fields that are not traditionally female clearly also warrants attention.

A reform strategy aimed both at pay equity and at broadening opportunities for part-time work in traditionally male-dominated jobs should dispel fears that reform could actually worsen the plight of women workers. Whether the reform of part-time work is so important that it should become a major focus for feminist efforts to reform the workplace, however, depends on the likely success of alternative reform strategies. The conflict between childrearing and career, for example, could be addressed by changes affecting the entire work force, such as shortening the normal work week.¹⁵⁶ Alternatively, reform could focus more narrowly on working parents only. For example, parents of young children could be given special privileges, such as parenting leaves¹⁵⁷ and subsidized

153. See Nollen, *supra* note 18, at 416.

154. See *id.*; see also Polit, *supra* note 93, at 203 (union leader argues that part-time workers displace full-time workers).

155. See Smith, *supra* note 28, at 45.

156. See Blumrosen & Culp, *supra* note 24 (advocating shorter workweek); see also INT'L LABOR OFFICE, WORLD LABOR REPORT, in Daily Lab. Rep. (BNA) No. 13, at A-4 (Jan. 1, 1985) (world-wide trend is toward workweek of fewer than 40 hours and longer vacations); E. MEEHAN, WOMEN'S RIGHTS AT WORK 189 (1985) (reduced workweek would blur the distinction between part-time and full-time workers).

157. See, e.g., CAL. GOV'T CODE § 12945(b)(2) (West 1980) (employer must grant reasonable unpaid maternity leave up to four months); CONN. GEN. STAT. ANN. § 46a-60(a)(7) (West Supp. 1984) (employer must grant reasonable leave of absence for pregnancy disability); MONT. CODE ANN. §§ 49-2-310 to -311 (1985) (employer must give reasonable leave of absence). This type of legislation requires special, favorable treatment of employed mothers, beyond the Title VII prohibi-

child care.¹⁵⁸ Like reforms targeting the part-time work force, however, these strategies have potentially significant drawbacks for women. Widespread reform aimed at all workers is likely to be politically infeasible and may do little to change the relative positions of men and women, either at home or at work. Programs aiding only parents of young children may be unfair to other workers with pressing needs that are not similarly accommodated. In addition, government subsidies given only to parents tend to reinforce the belief that legislators have a legitimate interest in influencing the procreative choices of individuals. This belief has proven harmful to women's interests in the past.¹⁵⁹

In the final analysis the political wisdom of reform efforts directed at part-time workers is confirmed by the continued desirability of part-time work to women workers.¹⁶⁰ Despite current disadvantages of part-time work, women have not been deterred from seeking part-time jobs.¹⁶¹ Although we cannot know with certainty what employment choices women would make absent inequality in the job market, it is reasonable to assume that a significant number of women and men would wish to work part-time, at least for a portion of their working lives. Moreover, when the demands of parenting are particularly acute, part-time work may be the least drastic means by which the competing needs of family and career can be accommodated. Unpaid parenting leaves may not be economically feasible for a family with limited income. In more financially secure families, parents may be reluctant to take lengthy leaves of absence, either because of ties to particular jobs or unwillingness to care for children on a full-time basis. For a host of practical reasons, it is unlikely that the desire for meaningful part-time work will abate, particularly among women in the labor force.

III. ANTIDISCRIMINATION LAWS AND PART-TIME WORKERS

Currently, part-time workers are afforded only limited protection under the two principal statutory schemes prohibiting sex discrimination in employment. Although part-time workers technically are covered under both the Equal Pay

tion of unequal treatment. See 42 U.S.C. § 2000e(k) (1982). Many groups, including the American Civil Liberties Union, the National Organization for Women, and the League of Women Voters, advocate extending such legislation to parents of either sex. See *Miller-Wohl Co. v. Commissioner*, 692 P.2d 1243, 1253 (Mont. 1984) (court rejected these groups' argument that State maternity leave statute should be extended to men). According to a recent study by Bernard Hodes Advertising, about half of the firms surveyed pay their female employees on maternity leave full salary, but only two percent of the firms offer paid paternity leave to male employees. *Daily Lab. Rep.* (BNA) No. 44, at A-4 (Mar. 3, 1985).

158. The principal support for child care at the federal level now takes the form of a tax credit for expenses of child care, which parents may claim if they work or go to school. 26 U.S.C.A. § 21 (Supp. 1986).

159. See Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 *WOMEN'S RTS. L. REP.* 175, 196-97 & n.118 (1982).

160. See Nollen, *supra* note 18, at 402 (listing women's organizations supporting federal part-time career legislation).

161. The number of female part-time workers 20 years of age and older almost doubled from 1965 to 1982, increasing from 4,371,000 to 8,777,000. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 410 (104th ed. 1984). During the same period, the number of female full-time workers 20 years of age and older increased at a lesser rate, from 18,260,000 to 31,897,000. *Id.*

Act (EPA)¹⁶² and Title VII of the Civil Rights Act of 1964 (Title VII),¹⁶³ courts and enforcement agencies have tended to interpret these statutes in a restrictive manner that legitimates the inferior status of part-time workers. An exception to the EPA allows employers to pay some part-time workers lower wages than full-time workers performing identical jobs.¹⁶⁴ Under Title VII, most courts have been reluctant to declare that lower pay scales for predominantly female jobs constitute actionable sex discrimination.¹⁶⁵ This hesitation to embrace a theory of comparable worth presents a formidable obstacle to narrowing wage disparities for many part-time workers. The following two sections of this Article review existing legal doctrines and advocate reinterpretation of antidiscrimination laws to advance the goals of pay equity and equal opportunity for part-time workers.

A. *The Equal Pay Act—Existing Doctrine*

1. Basic Elements of an Equal Pay Act Claim

The EPA prohibits discriminatory payment of lower wages to women who perform work substantially equal to work performed by men.¹⁶⁶ To state a *prima facie* case under the EPA, a claimant must prove that her job is substantially equal¹⁶⁷ to that of a male worker¹⁶⁸ who receives a higher wage¹⁶⁹ in the

162. 29 U.S.C. § 206(d)(1) (1982). Under the EPA, any employer subject to the minimum wage provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-261 (1982), must refrain from paying female employees unequal wages for equal work. The EPA also extends to executive, administrative, and professional employees who are exempted from FLSA coverage for most purposes. See B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 437-38 (2d ed. 1983). The courts have uniformly construed the EPA to cover part-time workers. See, e.g., *Lanegan-Grimm v. Library Ass'n*, 560 F. Supp. 486 (D. Or. 1983); *EEOC v. School Bd.*, 27 Empl. Prac. Dec. (CCH) ¶ 32,330 (W.D. Pa. 1980), *aff'd mem. sub nom. Marshall v. School Bd.*, 661 F.2d 914 (3d Cir. 1981).

163. 42 U.S.C. § 2000e (1982). Title VII protects any "individual" against discrimination on the basis of race, color, religion, sex, or national origin at the hands of a covered employer. See *id.* § 2000e(c). With a few specified exceptions, any employer with 15 or more employees is covered. See *id.* § 2000e(b). As affected "individuals," part-time employees of covered employers are protected. See, e.g., *Mecklenburg v. Montana State Bd. of Regents*, 13 Empl. Prac. Dec. (CCH) ¶ 11,438 (D. Mont. 1976); *Hodgson v. Food Fair Stores, Inc.*, 329 F. Supp. 102 (M.D. Pa. 1971). See generally 1 A. LARSON & L. LARSON, *EMPLOYMENT DISCRIMINATION* § 5.32(a) (1984) (discussing conditions under which part-time employees are covered by Title VII). The courts have even been willing to consider part-time workers "employees" for purposes of satisfying the 15 employee jurisdictional requisite. See, e.g., *Pedreya v. Cornell Prescription Pharmacies, Inc.*, 465 F. Supp. 936 (D. Colo. 1979); *Stratton v. Drumm*, 445 F. Supp. 1305 (D. Conn. 1978); *Pascutoi v. Washburn-McReavy Mortuary, Inc.*, 11 Fair Empl. Prac. Cas. (BNA) 1325 (D. Minn. 1975).

164. See *infra* text accompanying notes 175-86.

165. See *infra* text accompanying notes 296-313.

166. The EPA provides:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions

29 U.S.C. § 206(d)(1) (1982).

167. The EPA claimant must show only that the jobs being compared are substantially equal, not identical. *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970). To determine whether jobs are substantially equal, courts look primarily to the four statutory factors of equal skill, effort, responsibility, and similar working conditions. For discussions of

same establishment.¹⁷⁰ Many part-time workers could probably make this *prima facie* showing. The data indicate that part-time status alone accounts for some of the pay disparity between full-time and part-time workers.¹⁷¹ One practical problem that part-time workers may encounter in stating *prima facie* cases is the lack of clear legal authority holding that an employer's payment of lower fringe benefits to part-time workers constitutes lower wages under the EPA.¹⁷²

the cases analyzing these four factors, see B. SCHLEI & P. GROSSMAN *supra* note 162, at 443-59; Sullivan, *The Equal Pay Act of 1963: Making and Breaking a Prima Facie Case*, 31 ARK. L. REV. 545, 559-83 (1978). Skill is defined by the Department of Labor to include "consideration of such factors as experience, training, education and ability. It must be measured in terms of the performance requirements of the job." 29 C.F.R. § 800.125 (1985). "Effort is concerned with the measurement of the physical or mental exertion needed for the performance of a job." *Id.* § 800.127. Responsibility is "concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation." *Id.* § 800.129. Similar working conditions relate to surroundings and hazards encountered on the job. *Corning Glass Works v. Brennan*, 417 U.S. 188, 202 (1974).

168. The few cases that have focused on the plaintiff's initial burden to demonstrate sex bias in pay rates require only a showing of individual adverse impact, *i.e.*, the existence of at least one male employee in the defendant's establishment who receives higher pay than the female plaintiff. *See, e.g., Winkes v. Brown Univ.*, 747 F.2d 792, 793 (1st Cir. 1984) (man claiming sex bias); *Futran v. Ring Radio Co.*, 501 F. Supp. 734, 738 (N.D. Ga. 1980); Sullivan, *supra* note 167, at 555-59 (discussing *prima facie* burden with regard to sex discrimination). Many EPA claimants, however, present much stronger *prima facie* cases by showing group adverse impact, *i.e.*, that female employees as a group are paid at a lower rate than male employees. *See, e.g., EEOC v. Central Kansas Medical Center*, 705 F.2d 1270, 1273 (10th Cir. 1983), *cert. denied*, 106 S. Ct. 312 (1985); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 875 (9th Cir. 1982); *Thompson v. Sawyer*, 678 F.2d 257, 270-71 (D.C. Cir. 1982); *Marshall v. A & M Consol. School Dist.*, 605 F.2d 186, 187 (5th Cir. 1979); *Marcoux v. Maine*, 37 Empl. Prac. Dec. (CCH) ¶ 35,259, at 37,798, 37,805-07 (D. Me. 1984); *Marshall v. J.C. Penney Co.*, 464 F. Supp. 1166, 1181 (N.D. Ohio 1979).

169. Wages have been broadly defined to "include all payments made to or on behalf of the employee as remuneration for employment." 29 C.F.R. § 800.110 (1985). For discussions of the cases and agency statements interpreting the term "wages," see 1 A. LARSON & L. LARSON, *supra* note 163, § 35.00; Sullivan, *supra* note 167, at 552-53. Although there is no question that such items as vacation pay and holiday pay are wages under the EPA, it remains unclear whether fringe benefits constitute wages. *See infra* note 172.

170. To be actionable under the EPA, sex-based wage discrimination must occur within a single establishment. The Secretary of Labor has taken the position that "establishment" means a "distinct physical place of business" rather than "an entire business or enterprise" which might include several stores, plants, or facilities. 29 C.F.R. § 800.108 (1985). For discussions of the establishment limitation, see B. SCHLEI & P. GROSSMAN, *supra* note 162, at 438; Sullivan, *supra* note 167, at 548-52.

171. *See supra* text accompanying notes 30-36.

172. The United States Supreme Court has expressly declined to rule on whether retirement benefits or contributions to retirement plans are wages under the EPA. *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 712 n.23 (1978). The Department of Labor has also expressly reserved judgment on whether the EPA covers fringe benefits that employers pay in recognition of services performed, including contributions to pension and profit sharing plans and life, health, and accident insurance. 29 C.F.R. § 800.113 (1985). A proposal was made during the Carter administration to define wages to include fringe benefits, *The Equal Pay Act—Fringe Benefits*, 46 Fed. Reg. 43,851 (proposed Sept. 1, 1981), but it was not adopted. *See infra* note 175. One court has held, however, that fringe benefits in the form of an employer-financed retirement fund constitute wages. *Probe v. State Teachers' Retirement Sys.*, 27 Fair Empl. Prac. Cas. (BNA) 1306, 1311 (C.D. Cal. 1981).

Employer-furnished fringe benefits are clearly "compensation" under Title VII. *Manhart*, 435 U.S. at 712 n.23. Thus, a female part-time worker receiving unequal fringe benefits may sue under Title VII for discrimination in compensation. The legal hurdles such a Title VII claimant might then face are whether the employer's available defenses are broader under Title VII than under the EPA and the proper allocation of the burden of proof. If, however, the plaintiff proves that she is performing work equal to that of a male employee who receives greater fringe benefits, *see supra* note 167, her case should proceed as if it were brought under the EPA. *See, e.g., Kouba v. Allstate Ins.*

Although many part-time workers could successfully state *prima facie* cases of discrimination under the EPA, their claims are more likely to falter on the issue of whether the employer established an affirmative defense. Once a plaintiff in an EPA case proves that she is being paid for equal work at a rate lower than her male counterpart, the burden of persuasion shifts to the employer to justify the disparity.¹⁷³ The EPA provides three specific defenses and one general defense to its basic equal pay command. Unequal pay is authorized if the disparity is the result of payments made pursuant to (1) a seniority system, (2) a merit system, or (3) a system measuring earnings by quantity or quality of production, or if the disparity is (4) based on any factor other than sex.¹⁷⁴ In the case of a female part-time worker who claims that she is paid at a lower hourly rate than a full-time male worker, the employer will most likely resort to the fourth affirmative defense to justify the disparity. The essence of the employer's case is that any pay disparity between part-time and full-time workers is authorized under the EPA because part-time status constitutes a "factor other than sex."

2. Agency Interpretations of the Fourth Affirmative Defense

The interpretations of the EPA originally issued by the Wage and Hour Administrator of the Department of Labor¹⁷⁵ provide that a worker's part-time status sometimes may justify unequal pay. In a special subsection addressing recognized defenses or exceptions to the equal pay standard, part-time workers are accorded only partial protection. The interpretation establishes a rule of

Co., 691 F.2d 873, 875 (9th Cir. 1982) (equal pay case involving wages, discussed *infra* at text accompanying notes 214-22); *Marcoux v. Maine*, 37 Empl. Prac. Dec. (CCH) ¶ 35,259, at 37,805 (D. Me. 1984); *Melani v. Board of Higher Educ.*, 561 F. Supp. 769, 781 n.20 (S.D.N.Y. 1983). *But see* *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1136 (5th Cir. 1983) (following Title VII disparate treatment precedents).

173. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974); 29 C.F.R. § 800.141 (1985).

174. 29 U.S.C. § 206(d)(1) (1982). For a discussion of the seniority, merit, and incentive system exceptions, see Sullivan, *supra* note 167, at 587-92.

175. The status of the existing interpretations is in limbo. On July 1, 1979, enforcement responsibility and authority for the EPA was transferred from the Department of Labor to the Equal Employment Opportunity Commission (EEOC). Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (1978). At that time, the EEOC stated that it declined to adopt the substantive interpretations of the EPA promulgated by the Labor Department's Wage and Hour Administrator, but would allow employers to continue to rely on them "to the extent they are not inconsistent with statutory revisions and judicial interpretations." The Equal Pay Act; Interpretations and Opinions, 44 Fed. Reg. 38,671 (1979). Recently, the chairman of the EEOC recognized the problems created by the agency's failure to adopt the existing regulations or to issue new ones. He described the existing regulations as "almost useless to employers and employees because it is impossible for them to know which regulations the EEOC deems effective and which it considers to have been overruled." OFFICE OF MANAGEMENT & BUDGET REPORT, REGULATORY PROGRAMS OF THE UNITED STATES GOVERNMENT, APR. 1, 1985-MAR. 31, 1986, reprinted in Daily Lab. Rep. (BNA) No. 154, at D-10 to D-13 (Aug. 9, 1985). The EEOC is currently considering whether to issue new interpretations, to issue a new statement of its enforcement policy, or simply to disavow the existing regulations without issuing anything in their place. *Id.* Thus, there is currently no reliable agency statement on the part-time work issue under the EPA. New interpretative regulations were proposed during the Carter administration, The Equal Pay Act; Interpretations, 46 Fed. Reg. 43,848 (proposed Sept. 1, 1981), but never adopted.

thumb that presumptively exempts those employees who work twenty or fewer hours a week from the protection of the EPA:

[T]he payment of a different wage to employees who work only a few hours a day than to employees of the opposite sex who work a full day will not necessarily involve noncompliance with the equal pay provisions, even though both groups of workers are performing equal work in the same establishment. No violation of the equal pay standards would result if, for example, the difference in working time is the basis for the pay differential, and the pay practice is applied uniformly to both men and women. However, if employees of one sex work 30 to 35 hours a week and employees of the other sex work 40 to 45 hours, a question would be raised as to whether the differential is not in fact based on sex since different rates for part-time work are usually for workweeks of 20 hours or less.¹⁷⁶

This interpretation attempts to help employers determine whether lower rates of pay for part-time workers represent lawful disparities based only on "the difference in working time" or unlawful discrimination based on the sex of the workers.¹⁷⁷ The interpretation clearly outlaws paying female part-time workers a lower hourly wage than male part-time workers doing identical work.¹⁷⁸ The interpretation apparently also questions lower pay scales for part-time workers in some situations in which male and female part-time workers are paid at the same rate¹⁷⁹ or in which the part-time work force is exclusively female.¹⁸⁰

176. 29 C.F.R. § 800.150 (1985). This interpretation covers temporary workers as well as part-time workers. The interpretation provides that the payment of a lower wage rate to temporary workers doing equal work may not be a violation of the EPA if "such a differential conforms with the nature and duration of the job and with the customary practice in the industry and the establishment, and the pay practice is applied uniformly to both men and women." *Id.* The interpretation uses one month of employment as a rule of thumb to determine "whether the employment is in fact temporary." *Id.*

The Carter Administration proposal would have deleted the interpretation governing part-time and temporary workers. *See supra* note 175. Under the proposal, unequal pay would be authorized only if the practice were "completely non-discriminatory and lacking any element of sex discrimination either expressly or impliedly" and had no "adverse impact" on either gender that was not "related to job performance." Equal Pay Act—Permissible Bases for Pay Differentials, 46 Fed. Reg. 43,852, 43,852 (proposed Sept. 1, 1981).

177. To be acceptable under the EPA, pay differentials may not be based even in part on the sex of workers. 29 C.F.R. § 800.142 (1985).

178. Disparate rates of pay may not be set for male and female part-time workers, even if one group costs more to employ. Under the interpretations, an employer may not justify a wage differential based on the claimed higher cost of employing female, rather than male, employees. *Id.* § 800.151.

179. An opinion letter issued by the Wage and Hour Administrator in 1975 indicated that an employer may violate the EPA even if some male part-time workers are paid the lower part-time rate. The Administrator found a possible EPA violation in a case in which 65% of the members of a full-time crew were male, worked 40 or more hours per week, and were paid \$.60 more per hour than the part-time workers. The part-time workers were 82% female and typically worked 35 hours per week. In the Administrator's opinion, neither the longer hours worked by the full-time employees nor their greater willingness to work overtime justified the pay disparity that fell most heavily (although not exclusively) on women workers. Moreover, the mere fact that both working groups were integrated did not insulate the employer from EPA liability. Opinion WH-359 (Aug. 7, 1975) (signed by Acting Wage-Hour Administrator Warren D. Landis). *But see* Opinion WH-347 (July 11, 1975) (signed by Acting Wage-Hour Administrator Warren D. Landis) (finding no EPA violation when both part-time and full-time working groups were integrated and part-time workers earned more per hour than full-time workers).

As an example of a questionable practice under the EPA, the interpretation hypothesizes a situation in which part-time employees of one sex are paid less than full-time employees of the other sex, even though part-time and full-time employees work substantially the same number of hours. This scenario is a good illustration of a case in which the employer uses the part-time designation as a pretext for intentional sex-based discrimination. If female "part-time" employees work almost as many hours a week as male "full-time" employees, a presumption may arise that sex, rather than hours of work, is the true reason for a pay differential. In less clearcut cases, the interpretation looks to common industry practice to determine whether pay differentials are suspicious. Because employers most often pay lower wages only to employees who work twenty hours per week or less, the interpretation uses the twenty-hour cutoff as a rule of thumb to distinguish lawful pay disparities from unlawful sex discrimination.

The interpretation does not explicitly state or otherwise indicate that employers who pay part-time workers less than full-time workers are insulated against liability only if the part-time employees work twenty hours a week or less.¹⁸¹ Rather, the interpretation suggests that pay disparities between part-time and full-time workers are generally tolerated, unless a suspicion of discrimination is created because of the sexual composition of the two groups of employees and the lack of a substantial difference in the number of hours worked by each group. Thus, if the two work forces are significantly integrated or if two segregated groups work a substantially different number of hours per week, the interpretation implies that a pay disparity is not unlawful.

As a practical matter, the partial part-time work exception to the equal pay standard is the most significant exception delineated in the interpretations.¹⁸² The other presumptively valid exceptions specifically mentioned¹⁸³ affect far fewer workers.

The interpretive exception for part-time workers under the EPA does not explain why part-time status alone should ever justify a pay disparity. Nor do the examples of other business practices authorized by the fourth affirmative

180. At least one court has ruled in favor of an exclusively female class of part-time workers. In *EEOC v. School Bd.*, 27 Empl. Prac. Dec. (CCH) ¶ 32,330, at 23,315 (W.D. Pa. 1980), plaintiffs were "light duty" custodians who worked 30 hours per week and complained of the higher wage paid to male "heavy duty" custodians who worked 40 hours per week. *Id.* at 23,316. The fact that there were no male part-time workers receiving the higher rate did not bar recovery. *But see* *Jacobs v. College of William & Mary*, 517 F. Supp. 791, 797 (E.D. Va. 1980) (EPA claim of part-time female basketball coach failed in part because all the male coaches taught full-time, year round), *aff'd*, 661 F.2d 922 (4th Cir.), *cert. denied*, 454 U.S. 1033 (1981).

181. Two other federal statutes use a 20 hour cutoff to determine part-time status. *See* 29 U.S.C.A. § 214(b)(4)(A) (West Supp. 1985) (authorizing subminimum wage employment for part-time student workers); 42 U.S.C. § 3056(f) (1982) (authorizing the creation of part-time jobs for low income, older Americans). These statutes do not explain why the 20 hour cutoff was chosen.

182. The parallel exception for temporary workers is also a significant exception. *See supra* note 176.

183. The interpretations authorize certain night shift differentials, 29 C.F.R. § 800.145 (1985), "red circle" rates (certain unusual, higher than normal rates maintained for numerous reasons), *id.* § 800.146, disparate salaries for workers temporarily assigned to different jobs, *id.* § 800.147, and disparate wages for workers in bona fide training programs, *id.* § 800.148. For a discussion of the various exceptions, see Sullivan, *supra* note 167, at 592-606.

defense suggest a single, coherent standard by which employers can distinguish between legitimate and illegitimate factors in setting pay rates.¹⁸⁴ The interpretations make clear that an employer may not base a wage differential expressly on the sex of an employee or group of employees.¹⁸⁵ But not all facially neutral pay practices are authorized.¹⁸⁶ The only common thread running through the disparate facially neutral practices approved by the interpretations is that they are all somewhat commonplace and thus do not represent extreme departures from normal business practice.

3. Supreme Court Cases Interpreting the Fourth Affirmative Defense

The United States Supreme Court's statements on the nature and scope of the EPA's fourth affirmative defense are sketchy and have not settled the significant issue whether only intentionally discriminatory practices are unlawful. The Court's first major decision, *Corning Glass Works v. Brennan*,¹⁸⁷ remains the most important case construing the EPA. *Corning Glass* did not, however, purport to delineate the precise scope of the fourth affirmative defense. The Court ruled only that an employer's ability to articulate a facially neutral factor as the reason for a pay disparity will not always insulate it from liability.

The Court in *Corning Glass* found an equal pay violation in the payment of a base wage rate to male night shift inspectors that was higher than the rate paid to female inspectors on the day shift. Corning unsuccessfully argued that the male inspectors were paid the higher rate because they worked at night, not because of their sex.¹⁸⁸ The Court began its analysis by placing the burden of justifying the pay differential on Corning.¹⁸⁹ Corning was unable to meet its burden for two principal reasons. First, because Corning paid the night shift a shift differential above and beyond the higher base rate, the time of day worked

184. The authorized practices, *supra* note 183, often serve dissimilar functions. For example, a night shift differential may reward employees for working under less desirable conditions than daytime employees. Similarly, incentive payments, performance raises, and higher wages for trainees may reward superior performance or induce such performance in the future. "Red circle" rates and longevity raises, like seniority systems, tend to protect employees' expectations regardless of performance. Temporary reassignment differentials tend to ensure that higher-paid workers will be available when needed. See *Campbell v. Von Hoffman Press, Inc.*, 483 F. Supp. 218 (W.D. Mo.), *aff'd*, 632 F.2d 69 (8th Cir. 1980).

185. See 29 C.F.R. § 800.142 (1985).

186. The "head of household" premium is a facially neutral practice that has been recognized as likely to violate the EPA. See *id.* § 800.149. The premium is purportedly given because of the worker's status as head of a family. The interpretations' drafters object to the premium because it operates as a subterfuge for intentional discrimination, tends to be paid only to male employees, and bears no relationship to job performance. *Id.* The courts are divided on the legitimacy of the head of household premium. See *Wambheim v. J.C. Penney Co.*, 705 F.2d 1492, 1495 (9th Cir. 1983) (head of household provision for spousal medical insurance upheld under Title VII), *cert. denied*, 104 S. Ct. 3544 (1984). But see *EEOC v. Fremont Christian School*, 609 F. Supp. 344, 351 (N.D. Cal. 1984) (head of household bonus unlawful when given only to men), *aff'd*, 781 F.2d 1362 (9th Cir. 1986); *Marshall v. A & M Consol. School Dist.*, 21 Fair Empl. Prac. Cas. (BNA) 134, 137 (S.D. Tex. 1977) (head of household bonus unlawful when given only to men), *aff'd*, 605 F.2d 186 (5th Cir. 1979).

187. 417 U.S. 188 (1974).

188. *Id.* at 197.

189. *Id.* at 196.

could not by itself fully explain the base rate differential.¹⁹⁰ Second, the Court found that the separate base wage rates had their geneses in sex discrimination. As a historical matter, the higher rate for males had been established to reflect the generally higher wage level for men and to compensate male workers for performing "demeaning" women's work.¹⁹¹ This history undercut Corning's contention that the base rate differential was a nondiscriminatory response to the greater psychological and physical demands of night work.¹⁹²

Corning Glass is often cited for its rejection of the so-called market defense.¹⁹³ The Court made clear that employers may not avoid liability under the EPA merely by relying on market factors and disclaiming any hostility to women.¹⁹⁴ The Court did not permit Corning to take advantage of women's lack of bargaining strength in the market and to justify the resulting pay disparity by claiming that women could have avoided the lower wage by securing higher-paid men's work.¹⁹⁵ Citing *Griggs v. Duke Power Co.*¹⁹⁶ for analogous support,¹⁹⁷ the Court concluded that the disparity in pay between male and female workers in *Corning Glass* was discriminatory because "though phrased in terms of a neutral factor other than sex, [it] nevertheless operated to perpetuate the effects of the company's prior illegal practice of paying women less than men for equal work."¹⁹⁸

This mode of analysis in Justice Marshall's opinion in *Corning Glass* suggests that the factor-other-than-sex defense is a relatively narrow one that should not seriously undermine the basic objective of the EPA. Under *Corning Glass*, it is clear that if an employer formerly expressly discriminated on the basis of sex, it may not escape liability unless it changes its practices to remedy the prior explicit discrimination. By disapproving of facially neutral practices that perpetuate prior discrimination, the Court seemed to follow the course previously set in Title VII cases. Title VII has been interpreted to outlaw not only intentional sex-based discrimination but also facially neutral practices that have an unjustified adverse impact on women.¹⁹⁹ Similar to the Title VII cases, *Corn-*

190. *Id.* at 192.

191. *Id.* at 204-05.

192. *Id.* at 204.

193. See, e.g., *Beall v. Curtis*, 603 F. Supp. 1563, 1579 (M.D. Ga.), *aff'd*, 778 F.2d 791 (11th Cir. 1985); *EEOC v. Village of Schaumburg*, No. 82 C 1825, slip op. (N.D. Ill. Dec. 6, 1983) (available on LEXIS, Genfed library, Dist file); *Marshall v. Georgia Southwestern College*, 489 F. Supp. 1322, 1330-31 (M.D. Ga. 1980); see also authorities cited in B. SCHLEI & P. GROSSMAN, *supra* note 162, at 462 (discussing market defense).

194. *Corning Glass*, 417 U.S. at 205.

195. *Id.* at 207-08.

196. 401 U.S. 424 (1971).

197. For a discussion of *Griggs* and its progeny, see Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. Rev. 305, 343-44 (1983).

198. *Corning Glass*, 417 U.S. at 209-10.

199. The United States Supreme Court has described disparate or adverse impact claims as involving "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). For examples of cases granting recovery under a disparate impact theory, see *Connecticut v. Teal*, 457 U.S.

ing *Glass* implies that employers not only must refrain from intentional sex-based discrimination but also must remove any unjustified barriers to equal pay, even if such barriers were not designed to discriminate. Under this reading, the principal difference between the two statutory schemes would be the EPA's approval of bona fide job evaluation plans, perhaps even if such plans disadvantaged women wage earners.²⁰⁰

There is also language in *Corning Glass*, however, to suggest that the intent of an employer is pivotal in determining the legality of a facially neutral pay practice. The Court examined the history of Corning's base wage rate differential to determine whether the higher rate was "in fact intended" to serve as compensation for the less desirable night work.²⁰¹ The history of the pay practice, coupled with the fact that the male employees also received a night shift differential denominated as such, makes it tenable to characterize *Corning Glass* as a case in which the employer merely failed to carry its burden of proving its lack of invidious intent.

Subsequent Supreme Court decisions have not appreciably refined the *Corning Glass* analysis and have left open the choice between a subjective standard of EPA liability centering on the employer's present purpose in adopting or maintaining a pay differential and a more objective standard that focuses on whether the pay disparity is justified in the particular context. Dicta in two later cases,²⁰² however, suggest that the Court may now be amenable to a more employer-oriented stance than the *Corning Glass* analysis.

In *City of Los Angeles Department of Water & Power v. Manhart*,²⁰³ the Supreme Court held that an employer could not require female employees to contribute more to a pension fund than male employees contributed. The Court rejected the City's contention that the different contributions were based on the neutral factor of longevity rather than on sex. In a footnote, the Court characterized the City's claim as "specious" and reasoned that a gender-neutral scheme, rather than a gender-based scheme, would more accurately key benefits to longevity. Because the challenged plan was explicitly based on sex, the EPA's fourth affirmative defense was unavailable. The Court suggested, however, that gender neutrality might be enough to establish the defense if the neutrality were genuine:

[A]n entirely gender-neutral system of contributions and benefits would result in differing retirement benefits precisely "based on" longevity, for retirees with long lives would always receive more money

440 (1982); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

200. The Court in *Corning Glass* read the legislative history of the EPA to permit employer use of factors incorporated in job evaluation plans. "Congress' intent, as manifested in this history, was to use these terms to incorporate into the new federal Act the well-defined and well-accepted principles of job evaluation so as to ensure that wage differentials based upon bona fide job evaluation plans would be outside the purview of the Act." *Corning Glass*, 417 U.S. at 201.

201. *Id.* at 204.

202. *County of Washington v. Gunther*, 452 U.S. 161 (1981); *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978).

203. 435 U.S. 702 (1978).

than comparable employees with short lives. Such a plan would also distinguish in a crude way between male and female pensioners, because of the difference in average life spans. It is this sort of disparity—and not an explicitly gender-based differential—that the Equal Pay Act intended to authorize.²⁰⁴

The tantalizing suggestion that the EPA authorizes disparate impact if such impact arises from a gender-neutral factor could be read to enlarge the fourth affirmative defense to encompass all facially neutral pay practices that are not intended to discriminate on the basis of sex. Such a reading, however, may take too little account of the specific factual context of *Manhart*. The Court in *Manhart* indicated only that the employer's noninvidious use of a facially neutral factor having a disparate impact on men as a group (that is, the use of longevity to determine retirement plan contributions and benefits) does not violate the EPA. It is not surprising that the Court would tolerate a neutral pay practice having a disparate impact on the traditionally advantaged male group,²⁰⁵ when the alternative practice expressly discriminated against individual women. The Court did not address the more difficult question whether the EPA allows employers to base their salary structures on neutral factors that have a disparate impact on women.

The latest Supreme Court discussion of the EPA's fourth affirmative defense is similarly ambiguous. By a narrow majority, the Court ruled in *County of Washington v. Gunther*²⁰⁶ that the equal work requirement of the EPA is not an essential ingredient in a Title VII claim of sex-based wage discrimination. *Gunther* construed the Bennett Amendment,²⁰⁷ the provision of Title VII that attempts to harmonize the general prohibitions of Title VII with the more specific provisions of the EPA. The Court held that the Bennett Amendment does not engraft the EPA's equal work requirement onto Title VII litigation, but merely incorporates the four affirmative defenses of the EPA into Title VII.²⁰⁸ In response to the dissenters' charge that the Court's ruling rendered the Bennett Amendment superfluous, the majority speculated that the Bennett Amendment's incorporation of the fourth affirmative defense into Title VII litigation could have "significant consequences for Title VII litigation."²⁰⁹ The Court indicated how the defense might narrow employer liability in comparison to ordinary Title VII litigation:

Title VII's prohibition of discriminatory employment practices

204. *Id.* at 713 n.24.

205. For an argument that disparate impact theory may not be invoked by traditionally favored groups, see Chamallas, *supra* note 197, at 366-68.

206. 452 U.S. 161 (1981).

207. 42 U.S.C. § 2000e-2(h) (1982). The Bennett Amendment provides:

It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Id. § 2000e-2(h).

208. *Gunther*, 452 U.S. at 171.

209. *Id.* at 170.

was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.* . . . The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach. The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination. Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of "other factors other than sex." Under the Equal Pay Act, the courts and administrative agencies are not permitted "to substitute their judgment for the judgment of the employer . . . who [has] established and applied a bona fide job rating system," so long as it does not discriminate on the basis of sex.²¹⁰

The *Gunther* dicta may be read to discredit the use of disparate impact analysis in EPA litigation. Unlike *Corning Glass*, which cited *Griggs* as analogous support for its interpretation of the EPA's fourth affirmative defense, the Court in *Gunther* contrasted the *Griggs* disparate impact analysis to the approach triggered by the fourth affirmative defense. The *Gunther* dicta, like the *Manhart* footnote discussed above, seem to suggest that the EPA's fourth affirmative defense protects a wide range of facially neutral practices. However, the *Gunther* dicta specifically approve only bona fide job rating systems, without commenting on the legitimacy of other facially neutral factors that might have a disparate impact on women.

Taken together, the Supreme Court opinions construing the EPA make only three firm points. First, the burden of establishing the fourth affirmative defense is on the employer. Second, the factor on which the employer relies to justify a pay disparity must at least be facially neutral. Last, pay differentials based on a bona fide job rating plan are protected. Beyond these three points, the Supreme Court opinions leave open the scope of the fourth affirmative defense. Most significantly, the opinions do not instruct lower courts how to judge the legitimacy of employer reliance on facially neutral factors that are not part of a job rating system and that tend to disadvantage women.

4. Lower Court Cases Interpreting the Fourth Affirmative Defense

For the most part, the decisions of lower courts have honored the three points made by the Supreme Court.²¹¹ The recent trend, however, is to broaden the scope of the EPA's fourth affirmative defense.²¹² Nonetheless, because the

210. *Id.* at 170-71 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); 109 CONG. REC. 9209 (1963) (statement of Rep. Goodell)).

211. There has been some reluctance, however, to place the burden of persuasion on the employer. See *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1136-37 (5th Cir. 1983) (treating burden of persuasion as if it were only a burden of production); *Derouin v. Litton Indus. Prods., Inc.*, 37 Empl. Prac. Dec. (CCH) ¶ 35,398, at 38,580 (E.D. Wis. 1984) (treating burden of persuasion as if it were only a burden of production).

212. See *infra* notes 214-32 and accompanying text.

decisions are far from uniform, it would be premature to pronounce that specific intent to discriminate has become the sole standard of liability under the EPA.²¹³

The most complete discussion of the scope of the fourth affirmative defense is set forth in the opinion of the United States Court of Appeals for the Ninth Circuit in *Kouba v. Allstate Insurance Co.*²¹⁴ *Kouba* tested the legality of the employer's practice of basing the salaries of new sales agents on the agents' prior salaries. The class of female agents in *Kouba* traced its lower average pay to Allstate's use of the prior salary factor.²¹⁵ The United States District Court for the Eastern District of California found an EPA violation, reasoning that use of the prior salary factor tended to perpetuate past discrimination against women. Because of its potential discriminatory effect, the district court held that the employer's use of prior salaries in setting rates of pay could not be regarded under the EPA's fourth affirmative defense as a "factor other than sex," unless the employer presented proof that each individual female agent's salary was not tainted by sex discrimination.²¹⁶

The Ninth Circuit Court of Appeals reversed and imposed a less stringent prohibition against the use of the prior salary factor.²¹⁷ The court held that the EPA's fourth affirmative defense is available whenever the employer proves that an acceptable business purpose underlies a challenged wage differential and that the employer's use of the factor was reasonable in light of its stated purpose and other practices.²¹⁸ The court thus was willing to permit Allstate to present proof that its reliance on prior salaries operated either as a sales incentive or as a predictor of the performance of new employees.²¹⁹

The "reasonableness" standard adopted by the Ninth Circuit in *Kouba* could readily operate in favor of employers.²²⁰ It is easy to convert this standard into a search for intentionality; in fact, the *Kouba* court's underlying con-

213. When the burden of persuasion is placed on the employer, it may be difficult to tell whether a ruling for the plaintiff reflects merely the employer's failure to prove lack of intentional discrimination or the court's independent assessment of the unjustified operation of a truly neutral factor.

214. 691 F.2d 873 (9th Cir. 1982). Strictly speaking, *Kouba* was a Title VII, rather than an EPA case. Although the EPA's equal work requirement was satisfied, plaintiff in *Kouba* brought only a Title VII claim. Her apparent reasons for doing so were uncertainty as to how the EPA affected Title VII and the less demanding class-consent requirements under Title VII. *Id.* at 875 n.3. The court, however, declined to follow Title VII disparate treatment analysis and refused to allocate the burden of persuasion to the plaintiff. It gave no indication that it would follow a different approach in a true EPA case. *Id.* at 875.

The claimants ultimately prevailed in *Kouba*. Allstate agreed to a five million dollar settlement, purported to be the largest back pay award ever made in an equal pay case. Daily Lab. Rep. (BNA) No. 192, at A-3 (Oct. 3, 1984).

215. *Kouba*, 691 F.2d at 875 n.5.

216. *Kouba v. Allstate Ins. Co.*, 523 F. Supp. 148, 162 (E.D. Cal. 1981), *rev'd*, 691 F.2d 873 (9th Cir. 1982).

217. *Kouba*, 691 F.2d at 878.

218. *Id.* at 876-77.

219. *Id.* at 877-78.

220. The court, however, characterized its "reasonableness standard" as a middle ground position between the "extremes" suggested by the litigants. *Id.* at 876. The court rejected Allstate's claim that the fourth affirmative defense prohibited only the explicit use of gender or the use of a neutral factor resulting in lower pay for all female employees. *Id.* On the other hand, the court also rejected both the district court's "perpetuation" approach and plaintiffs' contention that the fourth

cern appears to have been with preventing employer "manipulation" of the prior salary factor.²²¹ The court did not, however, entirely foreclose an objective approach to assessing reasonableness, which would not focus exclusively on the subjective intent of the employer. In two footnotes,²²² the court noted that some business reasons for salary disparities that make "economic sense" may nevertheless be unacceptable, and it reserved judgment on whether "market demand" can ever be used to justify unequal pay. These reservations suggest that the court has not yet wholeheartedly embraced an intent standard.

The United States Court of Appeals for the Eighth Circuit has also protected employer interests²²³ by resurrecting a modified market defense, despite the Supreme Court's warning in *Corning Glass* that employers should not take advantage of a market that is inhospitable to women. The court in *Horner v. Mary Institute*²²⁴ held that an employer may meet the salary demands of a new male employee, even if an incumbent female is currently doing the same job for lower pay. The hair-splitting distinction between *Horner* and *Corning Glass* is that the male employee in *Horner* affirmatively held out for more money, but the female employees in *Corning Glass* were passively willing to work for lower wages than their male counterparts. Given that such a distinction is hardly compelling,²²⁵ it may be appropriate to regard *Horner* as a case that requires evidence of invidious employer intent to discriminate before finding an EPA violation.

Despite these appellate opinions tending toward a broad construction of the fourth affirmative defense, there is still much uncertainty concerning the scope of the defense. The United States Court of Appeals for the District of Columbia Circuit recently rejected an employer's attempt to infuse disparate treatment analysis into EPA litigation.²²⁶ Two other appellate courts have stated in dicta that proof of intent to discriminate under the EPA is unnecessary, describing the EPA's approach as a strict liability theory of discrimination.²²⁷ Moreover, the fourth affirmative defense appears to have a narrower scope in cases in which

affirmative defense protected only reliance on factors that "measure the value of an employee's job performance to his or her employer." *Id.* at 877.

221. *See id.* at 878.

222. *Id.* at 876-77 nn.6-7.

223. *Horner v. Mary Inst.*, 613 F.2d 706, 714 (8th Cir. 1980). The United States Court of Appeals for the Fifth Circuit also apparently construes the EPA's fourth affirmative defense to require a showing of invidious intent. *See Plemmer v. Parsons-Gilbane*, 713 F.2d 1127 (5th Cir. 1983). The court in *Plemmer* used a Title VII disparate treatment framework in analyzing an EPA claim and remanded the case to give plaintiff the opportunity to prove that the employer's proffered reasons for the challenged pay disparity were a pretext for discrimination. *Id.* at 1137; *see also Derouin v. Litton Indus. Prods.*, 37 Empl. Prac. Dec. (CCH) ¶ 35,398, at 38,580 (E.D. Wis. 1984) (using disparate treatment framework in EPA case).

224. 613 F.2d 706, 714 (8th Cir. 1980).

225. *See EEOC v. Village of Schaumburg*, No. 82 C 1825, slip op. (N.D. Ill. Dec. 6, 1983) (available on LEXIS, Genfed library, Dist file) (rejecting *Horner*'s endorsement of the market defense).

226. *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1080 (D.C. Cir. 1984) (employer that intentionally segregates jobs by sex may not defend by proving a good faith belief that jobs were unequal).

227. *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1261 (7th Cir. 1985); *Strecker v. Grand Forks County Social Serv. Bd.*, 640 F.2d 96, 99 n.1 (8th Cir. 1980); *accord Lanegan-Grimm*

plaintiffs secure judgments. For example, in *Schulte v. Wilson Industries*²²⁸ the court interpreted *Gunter* as limiting application of the fourth affirmative defense to bona fide job rating systems²²⁹ and relied on Title VII disparate impact precedents to hold that an employer could not use an employee's college degree as a factor in setting the employee's salary. Reliance on the college degree did not meet the test of job-relatedness.²³⁰ Another district court has cited *Corning Glass* for the proposition that the fourth affirmative defense does not shield "seemingly neutral factors which would operate to perpetuate past discrimination."²³¹ Finally, the United States Court of Appeals for the Sixth Circuit has explicitly refused to embrace either a broad or a narrow construction of the fourth affirmative defense, preferring to await a more appropriate case to express an opinion.²³²

B. *Reforming the Equal Pay Act for Part-Time Workers*

Whether part-time workers can successfully claim equal pay for equal work under the EPA hinges on what standard the courts ultimately adopt to delimit the scope of the fourth affirmative defense. The choice is between a subjective standard that focuses exclusively on an employer's state of mind or a more objective standard that looks to other factors to determine whether a pay disparity is justified.

A subjective intent standard will likely maintain the status quo. Under a subjective standard, the twenty hours per week rule of thumb²³³ may continue to function as a rough guide to liability. Probative circumstantial evidence in determining subjective intent is whether the employer follows a common practice in paying its part-time work force at a lower rate. The twenty hour cutoff, which is purportedly based on normal industry practice, alerts employers that unusual pay practices may be vulnerable to charges of discrimination. But the twenty hour standard presumably also authorizes lower pay for "true" part-time workers. Under this approach, many employers can continue to pay part-time workers less for equal work, provided that they do not segregate their work forces to such an extent that the lower part-time wage may be seen only as a

v. Library Ass'n, 560 F. Supp. 486, 491 (D. Or. 1983); Gerlach v. Michigan Bell Tel. Co., 501 F. Supp. 1300, 1319 (E.D. Mich. 1980).

228. 547 F. Supp. 324 (S.D. Tex. 1982).

229. *Id.* at 339 n.16.

230. *Id.* at 341.

231. *Marshall v. J.C. Penney Co.*, 464 F. Supp. 1166, 1195 (N.D. Ohio 1979).

232. *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1031 (6th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984). Early EPA opinions involving the question whether employee training programs constituted a factor other than sex adopted a narrow construction of the fourth affirmative defense. *See, e.g., Hodgson v. Behrens Drug Co.*, 475 F.2d 1041, 1047 (5th Cir.) (male-dominated training program not a defense under the EPA because program lacked a determinable termination point), *cert. denied*, 414 U.S. 822 (1973); *Schultz v. First Victoria Nat'l Bank*, 420 F.2d 648 (5th Cir. 1969) (exclusively male training program not a defense because program was informal and unwritten, and advancement was unpredictable). *See generally Sullivan, supra* note 167, at 592-95 (discussing training program exception).

233. *See supra* text accompanying note 176.

pretext for sex discrimination.²³⁴

If the courts reject a subjective standard as the test governing the scope of the fourth affirmative defense in EPA cases, part-time workers will be able to marshal compelling arguments in favor of equal pay. The degree of protection that part-time workers may receive if the courts select an objective standard is likely to depend on the ability of employers to prove that part-time workers are less qualified or less effective than full-time workers. If the focus is on work-related qualities of the part-time work force, the employer's burden of proof will increase significantly, and part-time workers stand a good chance of winning equal pay cases.

1. The Case Against a Subjective Standard

Arguments against the adoption of an intent-based standard of liability are distressingly familiar to the civil rights lawyer because they have been made so often, frequently to no avail in the politically conservative legal climate of the last decade.²³⁵ However, legal and policy arguments against using motivational analysis in the EPA context are particularly strong. With respect to the part-time work issue, the relevant question is likely to be whether the courts believe that employers should have the right to exact special penalties for an employee's decision to work part-time.

The case against an intent-based standard begins with an appreciation for the policy behind the EPA. In passing the Act, Congress recognized that it was addressing a specific problem that was based on the fact that the "wage structure of all too many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same."²³⁶ Congress expected that this legislation would have a significant effect on employer pay practices and would change the market price for women's labor. Expected disruptions in the business world and labor market were tolerated because the basic principle that there should be equal pay for equal work was not seriously contested.²³⁷

234. The one measure of protection that part-time workers might continue to enjoy if subjective intent were adopted as the governing standard is the placing of the burden of persuasion on the employer. As long as employers must prove that sex bias played no part in their decision to pay part-time workers less for equal work, the part-time claimant stands a chance to win. However, if a subjective standard is chosen, courts might be inclined to reallocate the burden of persuasion to the plaintiff. See *supra* notes 211, 223. For a discussion of the allocation of burdens of proof in Title VII disparate treatment cases, see *Furnish, Formalistic Solutions to Complex Problems: The Supreme Court's Analysis of Individual Disparate Treatment Cases Under Title VII*, 6 INDUS. REL. L.J. 353 (1984).

235. For cases requiring proof of discriminatory intent, see *General Bldg. Contractors Ass'n v. Pennsylvania*, 485 U.S. 375 (1982) (claim for violation of 42 U.S.C. § 1982 (1982)); *Mobile v. Bolden*, 446 U.S. 55 (1980) (claim of voting dilution); *Washington v. Davis*, 426 U.S. 229 (1976) (claim of race discrimination in hiring); *Keyes v. School Dist.*, 413 U.S. 189 (1973) (suit for school desegregation); cf. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983) (discriminatory intent required only for award of compensatory damages under Title VI).

236. S. REP. NO. 176, 88th Cong., 1st Sess. 1 (1963); see Note, *Not Just Any "Factor Other Than Sex": An Analysis of the Fourth Affirmative Defense of the Equal Pay Act*, 52 GEO. WASH. L. REV. 318, 321-27 (1984).

237. See H.R. REP. NO. 309, 88th Cong., 1st Sess. 687 (1963), reprinted in 1963 U.S. CODE CONG. & AD. NEWS 687; S. REP. NO. 176, 88th Cong., 1st Sess. 1 (1963).

Compared to the more controversial concept of comparable worth, the EPA mandate of equal pay for equal work is relatively well-defined and commands a consensus that other tenets of antidiscrimination law do not enjoy. As the Supreme Court in *Corning Glass* recognized, when Congress narrowed the scope of the EPA to encompass only jobs that were recognized by industry experts to be equal,²³⁸ the room for employer justification of pay disparities decreased correspondingly. The narrow definition of equal work in the EPA means that, as a practical matter, an EPA plaintiff's prima facie burden to prove equal work is particularly difficult compared to evidentiary burdens imposed by other civil rights statutes.²³⁹ It is not enough for the female EPA plaintiff to present evidence that her employer is generally hostile or unsympathetic to the interests of women. Absent proof of unequal pay for equal work—most often supplied by job evaluation experts—a plaintiff cannot state a claim under the EPA. At least in those instances in which a plaintiff proves that her employer's policies result in a pattern of lower wages for women,²⁴⁰ the defendant should be required to shoulder a comparably heavy burden. In such cases, it is fair to require the employer to pinpoint a specific business reason that serves to justify, not merely to excuse, the pay disparity.

Rejection of an exclusively intent-based standard of liability under the EPA is also compatible with the Supreme Court precedent, particularly Justice Marshall's liberal opinion in *Corning Glass*. The Court in *Corning Glass* read a confusing legislative history²⁴¹ to warrant shifting the burden of persuasion to the employer once an EPA plaintiff has proved equal work.²⁴² The Court's decision to assign the burden to the employer and to treat the factor-other-than-sex ex-

238. *Corning Glass*, 417 U.S. at 198-202.

239. For example, to establish a prima facie case of disparate treatment in hiring under Title VII, a female plaintiff need show only that (1) she belongs to a protected minority; (2) she applied for and was qualified for a job for which the employer was seeking applicants; (3) despite her qualifications, she was rejected; and (4) after her rejection, the position remained open and the employer continued to seek applications from persons with plaintiff's qualifications. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (black worker asserting racial discrimination). Many courts have adapted the *McDonnell Douglas* test in framing the elements of a plaintiff's prima facie case of disparate treatment under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982). See generally B. SCHLEI & P. GROSSMAN, *supra* note 162, at 498-99 (discussing prima facie case under ADEA).

240. If the EPA claimant can identify only one male worker who is doing equal work and receiving a higher wage, and the average wage for female workers in the job category is no lower than the average male wage, the case against a subjective standard of liability is far less compelling. Cf. *Winkes v. Brown Univ.*, 747 F.2d 792 (1st Cir. 1984) (no EPA violation when male professor was paid less than one of his female colleagues who received a salary increase commensurate with an outside offer). *Winkes* is discussed in Freed & Polsby, *Comparable Worth in the Equal Pay Act*, 51 U. CHI. L. REV. 1078, 1103-06 (1984), and Becker, *Comparable Worth in Antidiscrimination Legislation: A Reply to Freed and Polsby*, 51 U. CHI. L. REV. 1112, 1121-28 (1984). Such cases are rare, however. In the more typical case in which plaintiff proves that the challenged practice has an adverse impact on women as a group, the more stringent objective standard of liability is warranted. See *supra* note 168.

241. For a discussion of conflicting statements in the EPA legislative history concerning the issue of the burden of proof, see 29 C.F.R. § 800.141(b) (1985). Even before *Corning Glass*, the Department of Labor took the position that the burden of persuasion should be placed on the employer, primarily because this was the practice under other provisions of the Fair Labor Standards Act. *Id.*

242. *Corning Glass*, 417 U.S. at 196-97.

ception as a true affirmative defense, rather than as a mere rebuttal, accords best with a non-intent-based notion of discrimination.

Under an intent-based theory, when liability centers on the sole issue of employer motivation, it is sensible to regard the employer's case as requiring a simple denial of the plaintiff's factual allegations. The employer is not called upon to justify its practice but must only present evidence indicating that the practice was not intentionally devised as a mechanism to discriminate against women. In such an intent-based system, the burden of persuasion on the critical issue of intent is most often assigned to the plaintiff. The plaintiff bears the burden of persuasion because the plaintiff is the party seeking a change in the status quo and because the plaintiff is charging the defendant with what most persons regard as morally repugnant behavior. Thus, in Title VII disparate treatment cases in which intent is the touchstone of liability, the Supreme Court has explicitly placed the burden of persuasion on the plaintiff.²⁴³

When the critical issue is not the factual existence of intent *vel non* but the more complex question whether a truly neutral practice should be regarded as acceptable or justified, the burden of persuasion should shift to the defendant. For example, in Title VII disparate impact cases, in which employer liability is premised on a finding of unjustified adverse impact, most courts assign the defendant the burden of persuasion.²⁴⁴ This assignment makes sense because the defendant is almost invariably the only party in possession of information most relevant to the justification issue. The employer presumably has considered alternative practices and is fully aware of the decision-making process that led it to adopt the challenged practice.²⁴⁵ Thus, if *Corning Glass* follows the Title VII pattern, the Court's assignment of the burden of persuasion to the defendant suggests that the substantive standard governing liability should be objective, as it is in Title VII disparate impact cases.

Aside from implications stemming from assigning the burden of persuasion to the employer, the Court's disapproval of a market defense in *Corning Glass* bolsters the argument that an employer's good faith should not insulate it from EPA liability. As the growing body of comparable worth cases indicates,²⁴⁶ employers frequently characterize their pay decisions as neutral responses to the market. Insofar as *Corning Glass* refuses to treat reliance on the market as necessarily nondiscriminatory, the case suggests that the EPA requires more than good faith treatment of women workers. *Manhart* also suggests that good faith

243. See, e.g., *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

244. See, e.g., *Walker v. Jefferson County Home*, 726 F.2d 1554, 1558 (11th Cir. 1984); *Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750, 753 (5th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982); *Ellison v. Best Foods*, 598 F. Supp. 159, 164 (E.D. Ark. 1984). *But see Croker v. Boeing Co.*, 662 F.2d 975, 991 (3d Cir. 1981) (plaintiff retains burden of persuasion); *Kirby v. Colony Furniture Co.*, 613 F.2d 696, 702 (5th Cir. 1980) (employer has burden of production but not persuasion); *Grove v. Frostburg Nat'l Bank*, 549 F. Supp. 922, 938 n.11 (D. Md. 1982) ("effect of *Burdine* on disparate impact analysis is unclear").

245. See *NAACP v. Medical Center, Inc.*, 657 F.2d 1322, 1355 (3d Cir. 1981) (Gibbons, J., concurring and dissenting).

246. See, e.g., *Spaulding v. University of Wash.*, 740 F.2d 686, 708 (9th Cir.), *cert. denied*, 105 S. Ct. 511 (1984); *Christensen v. Iowa*, 563 F.2d 353, 354 (8th Cir. 1977); *Briggs v. City of Madison*, 536 F. Supp. 435, 446 (W.D. Wis. 1982).

is not always a good defense.²⁴⁷ The *Manhart* Court's adamant refusal to allow employers explicitly to distinguish between men and women workers with respect to fringe benefits indicates that even the most widely accepted good faith practices may violate the EPA.²⁴⁸

2. Implications of Varying Objective Approaches

If intent is not the exclusive governing standard for EPA liability, there is no good reason for adhering to the Department of Labor's twenty hour per week cutoff.²⁴⁹ The twenty hour rule can be justified only as a rule of thumb for detecting employers who may be using part-time status as a pretext for intentional sex discrimination. As Professor Sullivan observed, the twenty hour rule seems designed to ferret out discriminatory motive:

If a different rate is applied to "true" part-time employees (in the sense that they work relatively few hours a week), the Bulletin views this as "normal" enough not to trigger suspicion that the scheme is a device concealing sex discrimination. On the other hand, the use of different rates for persons whose working week approaches full-time stature is sufficiently abnormal to raise doubts about the basis for the decision, requiring the employer to provide at least some persuasive, non-gender related reason for its compensation structure.²⁵⁰

The Department of Labor's interpretations do not indicate what objective considerations, if any, may justify paying lower wages to "true" part-time workers. Nor is it possible to detect a real difference between an employee who works twenty hours a week and another who works thirty hours. Because the twenty hour cutoff is not easily tied to any of the possible objective approaches to the EPA's fourth affirmative defense, it is unlikely to be adopted by a court that rejects intent as the standard of liability.

Aside from undermining the rationale for the twenty hour cutoff, the rejection of intent as the standard of EPA liability does not help to formulate an objective standard to be used in its stead. Three objective standards have sur-

247. See *Manhart*, 435 U.S. at 711.

248. The procedural and remedial scheme of the EPA also accords with a non-intent-based standard of liability. The EPA claimant must file within two years of the accrual of the cause of action, unless the violation was willful. 29 U.S.C. § 255(a) (1982). Further, the successful EPA claimant is entitled to liquidated damages, unless the employer proves "that the act or omission giving rise to [the EPA] action was in good faith and that [the employer] had reasonable grounds for believing that his act or omission was not a violation." *Id.* § 260; see Richards, *Monetary Awards in Equal Pay Act Litigation*, 29 ARK. L. REV. 328 (1975). This two-tiered system suggests that there may be liability without invidious intent but that such intent may lengthen the statute of limitations or trigger an award of liquidated damages. This reasoning persuaded the court in *EEOC v. Mifflin School Dist.*, 39 Fair Empl. Prac. Cas. (BNA) 1059 (E.D. Pa. 1985), to hold that disparate impact analysis was appropriate in Age Discrimination in Employment Act (ADEA) litigation. However, the court in dicta contrasted the EPA statutory scheme to the ADEA and disapproved of the use of the disparate impact standard in EPA litigation. *Id.* at 1065. The court concluded that the language of the ADEA is more supportive of an objective approach than the language of the EPA because the ADEA permits employment decisions based on "reasonable factors other than age," while the EPA's fourth affirmative defense protects employers who rely on "any factor other than sex" in making employment decisions. *Id.*

249. See *supra* text accompanying note 176.

250. Sullivan, *supra* note 167, at 604.

faced in cases and commentary. Although they could differ appreciably in operation, each standard is capable of bringing part-time workers within the basic protection of the EPA.

The "reasonableness" test adopted by the Ninth Circuit in *Kouba*²⁵¹ is an employer-oriented test that barely qualifies as an objective standard. Reminiscent of the minimum level of scrutiny in equal protection constitutional analysis,²⁵² the reasonableness standard easily could collapse into a search for intent. As articulated by the court, however, the *Kouba* reasonableness test incorporates two objective features: a requirement that courts decide as a threshold matter that an employer's proffered justification for a pay disparity is "acceptable" and a requirement that employers adduce preponderant proof that their compensation standards in fact further such acceptable ends.

The two alternative objective standards have much in common and are considerably more employee-oriented than the *Kouba* reasonableness test. At least two district courts²⁵³ and a student commentator²⁵⁴ have suggested that the EPA's fourth affirmative defense should encompass only factors that are objectively job-related. Supporters of this view argue that Congress regarded only those factors traditionally included in job evaluation schemes as embodying concerns significant enough to justify deviation from the equal pay standard.²⁵⁵ In a similar vein, Professor Sullivan has argued that liability standards applied in Title VII cases should guide EPA analysis as well.²⁵⁶ Under this approach, any pay policy that systematically disadvantages women would be justified only if it were regarded as a business necessity.

In practice, the two alternative objective standards are likely to produce the same results, although Professor Sullivan's approach functions more directly to create a coherent conception of equality by harmonizing the two antidiscrimination statutes.²⁵⁷ Both alternative objective standards clearly require employers to justify neutral compensation practices that have a disparate impact on women. Both standards also focus on actual job performance or on the qualities possessed by employees that are predictive of successful job performance.

Probably the major difference between these two objective standards and the *Kouba* reasonableness test is that the former incorporate the judgment that

251. See *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876-77 (9th Cir. 1982) (discussed *supra* text accompanying notes 214-22).

252. Courts faced with equal protection challenges to economic legislation most often employ a "rational relation" test to determine the constitutionality of the legislation. Under this deferential standard, economic legislation is upheld so long as it furthers a legitimate state objective. See, e.g., *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). Only very rarely is state action overturned under the rationality standard. See, e.g., *Cleburne v. Cleburne Living Center, Inc.*, 105 S. Ct. 3249 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

253. *Schulte v. Wilson Indus., Inc.*, 547 F. Supp. 324, 341 (S.D. Tex. 1982); *Kouba v. Allstate Ins. Co.*, 523 F. Supp. 148, 161-62 (E.D. Cal. 1981), *rev'd*, 691 F.2d 873 (9th Cir. 1982).

254. Note, *supra* note 236, at 322.

255. *Id.* at 323-25.

256. Sullivan, *supra* note 167, at 584-87; see also The Equal Pay Act, 46 Fed. Reg. 43,850, 43,852 (Sept. 1, 1981) (proposing a standard similar to Sullivan's approach).

257. Sullivan, *supra* note 167, at 585.

workers' interest in equal opportunity should be subordinated only to employers' interest in securing a qualified work force, that is, merit considerations.²⁵⁸ Under these two objective standards, adverse impact is justified only when a challenged practice is necessary to reward employee merit or to attract employees of a high quality. The *Kouba* test, in contrast, presumably would allow any legitimate business objective to override the interest in equal opportunity, even if the objective were not specifically tied to merit considerations.

A part-time worker's chances for success in an equal pay claim under any of these three objective standards is difficult to predict in the abstract. Such a lawsuit would turn on two key considerations: the nature of the employer's reason for the pay disparity and the degree to which the employer could demonstrate that the disparity was in fact attributable to the proffered reason. Although the *Kouba* test would shield more employers from liability than the other two standards, part-time workers should be able to present viable claims under all three approaches.

Employers are likely to focus on three types of justification to counter challenges to existing pay disparities between full-time and part-time workers. First, employers are likely to argue that the market rate for part-time workers is lower than that for full-time workers because part-time workers are willing to work for lower pay. Second, some employers may gather data indicating that costs of employing part-time workers are greater than those for full-time workers. For example, the employer might claim that part-time workers quit their jobs more frequently, cost more to supervise, or generate higher record keeping costs. Finally, employers may argue that part-time workers are less capable workers in certain jobs that purportedly require the attention of one full-time worker. For example, an employer might claim that even two supervisory level part-time workers are less capable of overseeing a staff of full-time subordinates than is one full-time supervisor.

An unadorned market rate defense premised solely on part-time workers' willingness to work for lower pay is unlikely to protect employers under any of the three objective tests. The defense certainly fails under the two more employee-oriented standards. The market rate is not so closely tied to actual or potential job performance to qualify as job-related, and if the defense were sub-

258. A similar debate in Title VII disparate impact cases centers around the question whether an employer must prove that a challenged practice is related to satisfactory job performance, or whether the employer may rely on other interests to meet its burden of proving that the practice is a business necessity. See, e.g., *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1552-53 (11th Cir. 1984) (employer may take fetal safety into account in excluding fertile women from toxic workplace); *Wright v. Olin Corp.*, 697 F.2d 1172, 1188-91 (5th Cir. 1982) (employer may take fetal safety into account in excluding fertile women from toxic workplace), *on remand*, 585 F. Supp. 1447 (W.D.N.C. 1984), *vacated*, 767 F.2d 915 (4th Cir. 1984). But see *Burwell v. Eastern Air Lines*, 633 F.2d 361, 371 (4th Cir. 1980) (*en banc*) (employer may not exclude pregnant female employee to prevent risk to fetus), *cert. denied*, 450 U.S. 965 (1981). When the interest the employer asserts is not as weighty as fetal health and involves only employer inconvenience or expense, courts may insist on proof of job-relatedness. See *Johnson v. Pike Corp. of America*, 332 F. Supp. 490 (C.D. Cal. 1971) (firing competent employee because of multiple wage garnishments unlawful); cf. *State Div. of Human Rights v. Xerox*, 65 N.Y.2d 213, 480 N.E.2d 695, 491 N.Y.S.2d 106 (1985) (unlawful under state antidiscrimination law to deny employment to otherwise qualified obese person based on fear of adverse impact on life or disability insurance program).

jected to a Title VII-type disparate impact challenge, it could not justify a pay disparity between substantially equal jobs.²⁵⁹

Even under the less stringent *Kouba* reasonableness test, the market rate defense would likely fail. Notably, the *Kouba* court expressly refused to rule on the propriety of an unadorned market defense.²⁶⁰ If, however, the employer were able to prove that it could not secure a sufficient number of competent full-time workers without raising the full-time rate, the market defense might succeed. The hair-splitting distinction sometimes drawn between forbidding employers to take advantage of a market that undervalues the services of women and allowing employers to keep pace with a market that places a greater value on services performed predominately by male employees could have some significance in the part-time work context.²⁶¹ This modified market defense should not be available, however, unless the employer offers proof that it tried and failed to fill full-time vacancies. Further, in keeping with the individualistic spirit of the EPA, even a court applying the *Kouba* reasonableness standard might refuse to accept a market defense in a situation in which salaries were not individually negotiated.²⁶²

The defense that part-time workers cost more to employ may protect employers from liability, but only if employers can document actual increased costs. Unlike the market defense, the cost factor may be tied more directly to an employer's actual experience with part-time workers and thus less readily linked to sex alone.

The principal problem with the cost defense is that it focuses on the aggregate part-time work force rather than on individual part-time workers. Thus, the cost factor is a generalization that may not fit many part-time employees. For example, the fact that an employer can document higher turnover rates and greater training costs for part-time workers as a group may not justify lower pay for a part-time worker who has greater seniority than the average full-time worker. The Supreme Court has taken the position that a focus on the aggregate work force is unlawful when the employer contends that women, as opposed to men, cost more to employ.²⁶³ In the part-time context, of course, the question is

259. Cf. *American Fed'n of State, County & Mun. Employees v. Washington*, 578 F. Supp. 846, 861-63 (W.D. Wash. 1983) (market rate reflects factors other than objective job worth), *rev'd*, 770 F.2d 1401 (9th Cir. 1985).

260. *Kouba*, 691 F.2d at 877 n.7 (court chose not to rule on propriety of defense because employer-defendant offered no evidence supporting its use).

261. For cases allowing a modified market defense, see *Horner v. Mary Inst.*, 613 F.2d 706, 714 (8th Cir. 1980) (EPA claim; pay differential based on experience, ability, and training); *Christensen v. Iowa*, 563 F.2d 353, 356 (8th Cir. 1977) (Title VII claim; factors included supply of willing workers and presence of organized labor); *Briggs v. City of Madison*, 536 F. Supp. 435, 446-48 (W.D. Wis. 1982) (Title VII claim; factors included perceived difficulties of recruitment and retention of qualified workers); cf. *Winkes v. Brown Univ.*, 747 F.2d 792 (1st Cir. 1984) (EPA permits employer to raise employee's salary to match outside offer).

262. See *Winkes v. Brown Univ.*, 747 F.2d 792 (1st Cir. 1984); *Horner v. Mary Inst.*, 613 F.2d 706 (8th Cir. 1980). In both cases, a modified market defense was allowed in circumstances in which salaries were individually negotiated.

263. See *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 716-17 (1978). The Court in *Manhart* cited 29 C.F.R. § 800.151 (1985) (see *supra* note 178) with approval, 435 U.S. at 714 n.26, and noted that an amendment to the EPA that would have authorized a wage differen-

more complex. The adversely affected group is not exclusively female and a facially neutral factor is used as the grouping principle. The propriety of the cost defense thus depends on whether group traits may be used to justify adverse treatment of individual employees.

The viability of the cost factor defense may well vary with the standard of liability the court chooses. Under the *Kouba* reasonableness test, the cost factor is likely to be viewed as "acceptable,"²⁶⁴ at least if the employer actually relied on the differing costs in setting pay rates. The chief difficulty an employer is likely to encounter under the *Kouba* standard is proving that it used the cost factor reasonably. This prong of the *Kouba* test should be construed to require an employer to show that the disparity in part-time workers' pay at least approximates the additional costs incurred in employing part-time workers. The mere fact that part-time workers cost more to employ should not justify a pay disparity unless there is an actual relationship between the amount of the disparity and the amount of the additional cost.²⁶⁵ Moreover, the employer's proof may be deficient if aggregate cost factors are not considered in setting pay rates of other segregable groups of employees, particularly groups that are predominantly male.²⁶⁶ If the *Kouba* reasonableness test is applied as stringently as advocated above, it is unlikely that it will provide a sturdy shelter for disparate treatment of part-time workers based on increased employment costs. The data suggest that employers' fears about the costliness of part-time workers have been exaggerated.²⁶⁷ If employers are required to do much more than express a good faith belief that part-time workers are more expensive to employ, there is a good possibility that existing pay disparities cannot be justified.

The cost factor defense has an even slimmer chance of success under the two more employee-oriented objective standards than under the *Kouba* test. Higher aggregate costs are not typically used in job evaluation plans as a factor in setting wage rates²⁶⁸ and thus are not shielded by the Congressional respect

tial tied to the "ascertainable and specific added cost resulting from the employment of the opposite sex" had been defeated. *Id.* at 717 n.32. Although the legislative history is unclear on this point, the Court doubted that even a limited cost defense based on the total cost of employing men and women would be permitted. *Id.*

264. Because the *Kouba* court rejected plaintiffs' contention that the EPA's fourth affirmative defense should be limited to factors that predict individual job performance, see *supra* note 220, it is likely that that court would take a fairly broad view in determining the acceptability of employer justifications for pay disparities.

265. See 29 C.F.R. § 800.143 (1985) (employer may have to show "a reasonable relationship between the amount of the differential and the weight properly attributable to the factor other than sex").

266. The use of aggregate profit figures to justify pay disparities between male and female employees has met with only limited success. One court has permitted an employer to pay its salesmen in a more profitable men's department a higher base salary than saleswomen in the women's department. *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589, 597 (3d Cir.), cert. denied, 414 U.S. 866 (1973). But see *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1031 (6th Cir. 1983) (distinguishing *Robert Hall* in a case in which lower paid females earned more profit than males and sold exactly the same product), cert. denied, 465 U.S. 1025 (1984). For criticism of *Robert Hall*, see 1 A. LARSON & L. LARSON, *supra* note 163, § 31.25, at 7-72 to -80.

267. See *supra* text accompanying notes 62-63.

268. Job evaluation plans typically center around the four factors used to evaluate job similarity under the EPA: skill, effort, responsibility, and working conditions. These four factors are broken down into subcategories, including education, experience, complexity of duties, and mental and/or

for job evaluation principles. Moreover, the cost defense fares no better under a Title VII disparate impact analysis. The courts in Title VII cases have generally looked suspiciously upon employer justifications of disparate impact that are not premised on the job-related qualities of individual employees.²⁶⁹ Additionally, courts deciding cases under Title VII frequently require more than a showing that higher costs will be incurred if discrimination ceases. To justify adverse impact of an employment practice on a group, an employer typically must show that the challenged practice is a business necessity.²⁷⁰ Business necessity in this context probably amounts to proof that the employer will go out of business or otherwise suffer severe economic loss if forced to eliminate the disparate impact.²⁷¹ This showing would be a particularly difficult one for an employer attempting to justify a pay disparity for part-time workers. Raising the part-time rate to the full-time rate is unlikely to be ruinous for an employer, particularly one who has discretion to slow down the rate of pay increases for full-time employees to offset the cost of pay equalization.²⁷²

Finally, the defense that a pay disparity is justified because part-time workers perform their jobs less competently than full-time workers is unlikely to succeed in many cases. Because this defense is grounded on specific job-related qualities of the part-time work force, it would seem to qualify as an acceptable defense under any of the three objective standards of liability. Certainly, when an employer proves that an individual part-time worker is less productive or less qualified than a full-time counterpart, the EPA permits a pay disparity. Claims of lower performance levels for part-time workers as a group, however, are not as persuasive in justifying pay differentials. An employer's contention that part-

visual demands. See D. TREIMAN, *JOB EVALUATION: AN ANALYTIC REVIEW* 6-7 (1979) (interim report to EEOC). Unlike higher aggregate costs, these factors relate directly to an employee's job performance. For a discussion of the job evaluation process, see Bellace, *Comparable Worth: Proving Sex-Based Wage Discrimination*, 69 IOWA L. REV. 655, 672-79 (1984).

269. See *supra* note 258.

270. In *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the Supreme Court defined business necessity as an employment practice that is "shown to be necessary to safe and efficient job performance." *Id.* at 332 n.14. The *Dothard* standard for formulation of business necessity closely resembles the formulation of that defense first enunciated in *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.) (practice is necessary to the safe and efficient operation of business), *cert. dismissed*, 404 U.S. 1006 (1971). Some lower courts have refused to apply *Dothard's* stringent formulation. See, e.g., *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1280 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982); *Chrisner v. Complete Auto Transit*, 645 F.2d 1251, 1260-61 (6th Cir. 1981). See generally B. SCHLEI & P. GROSSMAN, *supra* note 162, at 1328-30 (discussing contours of business necessity defense).

271. Even proof of considerable economic loss does not justify explicit disparate treatment under Title VII. See, e.g., *Fernandez v. Winn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981) (reluctance of defendant's Latin American and Asian customers to transact business with a woman was no defense to disparate treatment claim); *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir.) (that marginal profits could be made by acceding to customer preference for female flight attendants was no defense), *cert. denied*, 404 U.S. 950 (1971); *Wilson v. Southwest Airlines*, 517 F. Supp. 292, 294-95, 303-04 (N.D. Tex. 1981) (defense that continued profits depended upon maintaining airline's "LOVE" image with young, pretty stewardesses ruled invalid).

272. The EPA, however, expressly forbids an employer to "reduce the wage rate of an employee" to achieve compliance. 29 U.S.C. § 206(d) (1982); see also 29 C.F.R. § 800.102 (1985) (wage rate differential paid in violation of EPA cannot be corrected by reducing wage rate of any employee); cf. *Ende v. Board of Regents of Regency Univs.*, 757 F.2d 176 (7th Cir. 1985) (affirmative action raises given only to female employees were lawful).

time status is a predictor of relatively poor job performance is more likely to justify a refusal to create part-time positions in particular job categories than to explain a pay disparity between two groups of workers. It is very difficult for an employer to present persuasive evidence that its part-time work force is less competent than its full-time work force and to tie the part-time workers' lower performance level to the precise difference in pay. These types of performance evaluations are typically made on an individual, not a group, level.²⁷³ If an employer is required to justify not only the existence but also the levels of existing pay disparities, the employer's burden of proof will be especially difficult to meet. Because available data suggest that there is generally no difference in quality between part-time and full-time workers,²⁷⁴ an employer will only rarely be able to demonstrate that such a quality difference exists in its workplace and to explain a pay disparity on the basis of quality alone.

In summary, none of the objective approaches to EPA liability is likely to provide much insulation for an employer relying on part-time status to justify a pay disparity. The crucial choice in EPA cases, therefore, is the choice between an intent or a non-intent-based standard of liability. Given the predominantly female character of the part-time work force,²⁷⁵ courts adopting an objective approach will be inclined to require proof that adverse treatment of part-time workers is independently justified and not simply rooted in an untested belief that part-time workers are less valuable workers. Unless courts become more inclined to accept a market defense in EPA litigation, part-time workers should be able to present formidable EPA claims.

Limiting employers' defenses in EPA cases is especially warranted in view of the narrow class of cases that the EPA governs. To escape liability, an employer may always demonstrate a difference in the jobs performed by the two groups of employees.²⁷⁶ Thus, if part-time workers' jobs involve less responsibility or make fewer physical or mental demands than jobs performed by full-time workers, a part-time worker will not be able to establish a *prima facie* case under the EPA. When the jobs of both groups are equal, only demonstrable differences in the quality of a part-time worker's ability or performance should justify a pay disparity.

C. Title VII—Existing Doctrine

Even if the EPA were interpreted to outlaw payment of lower wages to part-time employees who perform work substantially equal to that of full-time

273. See 29 C.F.R. § 800.143 (1985). The interpretation permits commissions based on individual earnings, but outlaws a higher "draw" for all male employees based on an employer's past experience that men generally earn more in commissions than women. *Id.*

274. See *supra* text accompanying notes 66-71.

275. Some conceptual difficulty may arise when both the part- and full-time work forces are predominantly female. For example, if the part-time work force in a particular job category is 95% female and the corresponding full-time force is 80% female, it may be difficult to conclude that a lower part-time rate of pay is a result of sex discrimination. In such cases, courts may be inclined to require other indicia of discriminatory motive. *Cf. supra* note 240 (an objective standard of liability is less compelling when the average wage for females is no lower than the average wage for males).

276. See *supra* text accompanying note 176.

workers, the relatively poor position of the part-time worker in the American workplace might not change appreciably.²⁷⁷ EPA protection alone is insufficient because most women who work part-time will be unable to identify any higher paid full-time male workers doing the same work.²⁷⁸ For the large number of part-time workers who are not protected by the EPA, the twin obstacles to achieving parity with full-time workers are the lack of access to high paying part-time work and the undervaluation of existing part-time employment.

1. Case Law on Access

The current interpretation of Title VII holds out little promise of remedying the problems created by the lack of high paying part-time work. No existing theory of discrimination requires employers to create attractive part-time work for women or other employees. As long as an employer parcels out existing jobs in a nondiscriminatory fashion, Title VII does not impose an affirmative duty to structure job opportunities in a way that meets the needs and desires of female applicants.²⁷⁹

The only access right peculiar to part-time workers under Title VII is their right to be considered for full-time work, regardless of sex. Employers have been held liable for locking women into part-time jobs and wrongfully denying their requests for full-time work.²⁸⁰ This kind of purposeful sex discrimination affects only women who work part-time involuntarily. For the voluntary part-time worker seeking an upgraded part-time job, Title VII has not yet proven useful.

2. Voluntary Part-Time Workers and Comparable Worth

Title VII does, however, possess the potential to benefit voluntary part-time workers if the concept of comparable worth²⁸¹ is used to remedy the problem of undervaluation of existing part-time jobs. The gravamen of part-time workers' Title VII comparable worth complaints would be that their pay has been depressed, in part at least, because the part-time work force is predominantly female.

To prove such a pay inequity claim, part-time workers could compare their jobs to jobs held by predominantly full-time male workers. If the jobs were

277. Probably the greatest impact of such an interpretation of the EPA would be to force employers to offer pro rata fringe benefits to the part-time work force. Such a reform, however, might also depend on the construction given to the term "wages" under the EPA. See *supra* note 172 (discussing the status of fringe benefits under the EPA and Title VII).

278. In some cases, both the full- and part-time work forces in a particular job category are predominantly female. See *supra* note 275.

279. It might be possible, however, to construe Executive Order 11,246 to require the creation of part-time work opportunities as an affirmative action obligation of government contractors. See Exec. Order 11,246, 3 C.F.R. 339 (1965), reprinted in 42 U.S.C. § 2000e app. at 28-31 (1982).

280. See *Taylor v. Charley Bros.*, 25 Fair Empl. Prac. Cas. (BNA) 602, 613 (W.D. Pa. 1981); *Herrington v. Abington School Dist.*, 20 Empl. Prac. Dec. (CCH) ¶ 30,098, at 11,519 (E.D. Pa. 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

281. For a definition of comparable worth, see *supra* note 4.

sufficiently similar or comparable in required skills and function, the part-time workers would have a basis for contending that their lower wages resulted from the predominantly female character of their working group.²⁸² Another possible method of invoking comparable worth analysis on behalf of part-time workers would be to compare the rates of pay of part-time workers (if the group were predominantly female) to the rates for full-time workers in the defendant's employ. Using statistical analysis, the rates could be analyzed to control for job-related factors relevant to setting salaries (for example, knowledge, skill, responsibility, and working conditions), excluding sex-linked factors, particularly the factors of part-time status and job category.²⁸³ If a disparity persisted even in the controlled rates, part-time workers would have a basis for claiming that sex, as reflected in the predominant sexual character of the part-time working group, was the true basis for the pay disparity.

There are not yet any cases invoking comparable worth theory on behalf of a plaintiff class composed exclusively of part-time workers. It is reasonable to assume, however, that in such cases courts would apply a doctrinal framework identical to or similar to that applied in comparable worth cases brought by full-time workers. Thus, the success of part-time workers asserting comparable worth claims is likely to depend on the success of comparable worth claimants generally. At this point, the trend is running against Title VII comparable worth claimants.²⁸⁴ The gains that have been made in the area of comparable worth are largely attributable to specific state legislative initiatives rather than to Title VII.²⁸⁵

282. When only similar jobs that contain many of the same tasks are compared, the methodology is sometimes referred to as the comparable work concept. See, e.g., BUREAU OF NAT'L AFFAIRS, PAY EQUITY AND COMPARABLE WORTH 18 (1984) ("The comparable work concept involves a claim that different jobs held by men and women are similar enough in their function and in their skills required to justify equal wages.").

283. When dissimilar jobs that have few or no common tasks are compared on the basis of measures of job worth (e.g., knowledge, skill, and mental and physical demands), the technique is known as comparable worth. *Id.*; cf. Campbell, *Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet*, 36 STAN. L. REV. 1299, 1320-23 (1984) (using regression analysis to discover which jobs the employer itself regards as similar).

284. See, e.g., *American Fed'n of State, County & Mun. Employees v. Washington*, 770 F.2d 1401 (9th Cir. 1985); *Spaulding v. University of Wash.*, 740 F.2d 686 (9th Cir.), *cert. denied*, 105 S. Ct. 511 (1984).

During the Reagan administration, both the EEOC and the United States Commission on Civil Rights have rejected a concept of comparable worth defined as an individual's claim of "increased compensation on the basis of the intrinsic worth or difficulty of [the employee's] job with that of other jobs in the same organization or community." Daily Lab. Rep. (BNA) No. 117, at F-1, F-2 (June 18, 1985) (citing *County of Washington v. Gunther*, 452 U.S. 161, 166 (1981)). The EEOC took the position that only claims of intentional wage discrimination are cognizable under Title VII and found "no statutory basis or case law support for the conclusion that evidence consisting solely of such a comparison is sufficient to establish a violation of Title VII." *Id.* The Civil Rights Commission issued a report concluding that "implementation of the unsound and misplaced concept of comparable worth would be a serious error." *Id.* 71:A-3 (Apr. 12, 1985). The Government Accounting Office, however, recently issued a report criticizing the Civil Rights Commission's report. *Id.* 117:A-12-13 (June 24, 1985).

285. According to a Bureau of National Affairs report, 14 states have comparable worth laws that cover both private and public employers. Nine of these states require equality in pay when women perform "comparable work." The other five states prohibit an employer from paying unequal wages to women who perform work of a "comparable character." In addition, several states

3. The Ambiguity of *Gunther*

The only directly relevant Supreme Court decision, *County of Washington v. Gunther*,²⁸⁶ is frequently cited by both proponents²⁸⁷ and opponents²⁸⁸ of comparable worth. *Gunther* involved a claim of pay disparity by an all-female class of prison guards who were paid less than male guards.²⁸⁹ The plaintiffs' case was quite strong. Although the job tasks performed by the two groups of guards were not substantially equal, they were intuitively similar.²⁹⁰ Most importantly, the county had conducted its own job evaluation and had paid the female guards less than their evaluated worth, while paying the male guards their full evaluated worth.²⁹¹ The holding of *Gunther* was very narrow—the Court decided only that the Bennett Amendment incorporates the four affirmative defenses of the EPA into Title VII claims of sex-based wage discrimination but does not impose the EPA's equal work requirement in such cases.²⁹² The Court carefully refrained from holding that the highly probative evidence offered by the plaintiffs was sufficient to establish a prima facie case under Title VII.²⁹³

Proponents of comparable worth read *Gunther* as support for a comparable worth theory in some form under Title VII.²⁹⁴ *Gunther's* recognition that sex-based wage discrimination occurs outside the narrow prohibitions of the EPA unleashed a host of plausible approaches to reducing the wage gap between men and women that is so strongly associated with occupational segregation. Opponents of comparable worth focus on the narrowness of the *Gunther* holding and the Court's dicta speculating on the possibility that the incorporation of the EPA's fourth affirmative defense may limit employers' liability under Title

have created special commissions or committees to study and/or implement comparable worth in the public sector only. BUREAU OF NAT'L AFFAIRS, *supra* note 282, at 55-56 (1984); A. COOK, *COMPARABLE WORTH: THE PROBLEM AND STATES' APPROACHES TO WAGE EQUITY* (1983).

286. 452 U.S. 161 (1981).

287. See, e.g., Barnett, *Comparable Worth and the Equal Pay Act—Proving Sex-Based Wage Discrimination Claims After County of Washington v. Gunther*, 28 WAYNE L. REV. 1669 (1982); Bellace, *supra* note 268; Gasaway, *Comparable Worth: A Post-Gunther Overview*, 69 GEO. L.J. 1123 (1981); Levit & Mahoney, *The Future of Comparable Worth Theory*, 56 U. COLO. L. REV. 99 (1984); Vieira, *Comparable Worth and the Gunther Case: The New Drive for Equal Pay*, 18 U.C.D. L. REV. 449 (1985); Note, *Comparable Worth: The Next Step Toward Pay Equity Under Title VII*, 62 DEN. L.J. 417 (1985).

288. See, e.g., Daily Lab. Rep. (BNA) No. 117, at F-1, F-2 (June 18, 1985) (EEOC position); Cox, *Equal Work, Comparable Worth and Disparate Treatment: An Argument for Narrowly Constraining County of Washington v. Gunther*, 22 DUQ. L. REV. 65, 109-12 (1983); O'Neill, *An Argument Against Comparable Worth*, in 1 U.S. COMM'N ON CIVIL RIGHTS, *COMPARABLE WORTH: ISSUE FOR THE 80's* 177 (1985); Rabkin, *Comparable Worth as Civil Rights Policy: Potential for Disaster*, in 1 U.S. COMM'N ON CIVIL RIGHTS, *COMPARABLE WORTH: ISSUE FOR THE 80's* 187 (1985); Williams, *Comparable Worth: Legal Perspectives and Precedents*, in 1 U.S. COMM'N ON CIVIL RIGHTS, *COMPARABLE WORTH: ISSUE FOR THE 80's* 148 (1985).

289. *Gunther*, 452 U.S. at 164 n.1.

290. The primary function of both groups of guards was to supervise prisoners, although the male guards supervised more prisoners than the female guards, who did more clerical work. *Id.* at 164-65.

291. According to the county's evaluation, plaintiff's should have been paid approximately 95% as much as male correctional officers, but they were paid only 70% as much. *Id.* at 180-81.

292. *Id.* at 171.

293. *Id.* at 166 n.8.

294. See *supra* authorities cited note 287.

VII.²⁹⁵

Put simply, proponents of comparable worth are inclined to read *Gunther* as permitting both disparate treatment and disparate impact claims of sex-based wage discrimination, subject only to the respect for bona fide job evaluation plans that the Court articulated in dicta. In contrast, opponents of comparable worth are apt to construe *Gunther* as requiring plaintiffs to prove intentional disparate treatment. Read so narrowly, *Gunther* may encourage claims by only a narrow class of plaintiffs who secure probative evidence of discriminatory intent, preferably by reliance on an employer's own job evaluation.

4. Analysis of Lower Court Comparable Worth Cases

Given the ambiguity of *Gunther*, it is not surprising that the lower courts have not agreed on the contours of Title VII claims of sex-based wage discrimination. To date, plaintiffs in Title VII sex-based wage discrimination suits have encountered three related doctrinal obstacles that generally defeat their comparable worth claims. First, some courts require direct evidence of intentional discrimination to state a prima facie case of disparate treatment.²⁹⁶ This requirement makes it virtually impossible for plaintiffs to prevail unless their employers deviate from their own job evaluations. Second, some courts allow employers to rely on a market-based rate in setting wages.²⁹⁷ Thus, even if a plaintiff can show a deviation from the employer's own job evaluation, the employer nevertheless may prevail by proving that its deviation reflected or was compelled by the market rate. Last, some courts do not permit disparate impact challenges to employers' overall pay structures.²⁹⁸ These courts take the position that such structural policies are not susceptible to disparate impact analysis, which should be used only to challenge operational policies, such as hiring criteria and other employee selection devices. Under this view, the comparable worth claimant is limited to proving discriminatory intent and consequently may encounter the first two obstacles discussed above.

With respect to the plaintiff's prima facie burden, a major stumbling block is not only the limitation of relief to claims of intentional discrimination but also some courts' insistence that intent be proven by direct evidence in the plaintiff's prima facie case.²⁹⁹ As in *Gunther*, such direct evidence most often consists of job evaluations done by defendants.³⁰⁰ Absent such evidence from the horse's

295. See *supra* authorities cited note 288.

296. See, e.g., *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1133 (5th Cir. 1983); *Power v. Barry County*, 539 F. Supp. 721, 726 (W.D. Mich. 1982).

297. See, e.g., *Christensen v. Iowa*, 563 F.2d 353, 356 (8th Cir. 1977); *Briggs v. City of Madison*, 536 F. Supp. 435, 447 (W.D. Wis. 1982).

298. See *Spaulding v. University of Wash.*, 740 F.2d 686, 705-08 (9th Cir. 1984). The *Spaulding* court distinguished *Wambheim v. J.C. Penney Co.*, 705 F.2d 1492 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 3544 (1984), which had allowed a disparate impact challenge to a specific employer policy (a head-of-household premium) "rather than a full-scale assault on the employer's salary practices." *Spaulding*, 740 F.2d at 708; see also *American Fed'n of State, County & Mun. Employees v. Washington*, 770 F.2d 1401 (9th Cir. 1985); *American Fed'n of State, County & Mun. Employees v. County of Nassau*, 609 F. Supp. 695, 712 (E.D.N.Y. 1985) (following *Spaulding* analysis).

299. See *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1133 (5th Cir. 1983).

300. There is also a question whether an employer must actually adopt a job evaluation study in

mouth, some courts are inclined to rule for defendants in order to avoid making the "essentially subjective assessment"³⁰¹ of the value of differing jobs.

A refusal to allow plaintiffs to rely on their own experts to establish the comparability of different jobs has been regarded by some as consistent with *Gunter*'s limited holding that arguably permits only claims of intentional discrimination.³⁰² However, there is no logical reason that a prima facie case of intent must be limited to proof by direct evidence secured from a defendant's own job evaluation. In other Title VII contexts, a prima facie showing of adverse impact, without direct evidence of discriminatory intent, is sufficient to create a rebuttable inference of intentional discrimination.³⁰³ Thus, the requirement that plaintiffs ultimately prove a case of intentional discrimination does not dictate the necessary elements of a prima facie case.³⁰⁴ Recognizing this distinction, one district court allowed a plaintiff to make out a prima facie case of intentional discrimination by adducing independent expert proof of job comparability.³⁰⁵ Another district court found intentional wage discrimination when an employer segregated women into one department and failed to conduct a job evaluation to assess the relative value of men's and women's jobs.³⁰⁶

The courts' reluctance to assess the comparability of different jobs is not always indicative of skepticism concerning the merits of job evaluation as a technique. Indeed, in EPA cases, courts have been required to compare jobs that employers claimed were different.³⁰⁷ In determining whether jobs are substantially equal under the EPA, courts have become quite comfortable in relying on

order for deviation from the study to create an inference of discrimination. See *American Fed'n of State, County & Mun. Employees v. County of Nassau*, 609 F. Supp. 695, 710 (E.D.N.Y.1985) (discriminatory intent may be proven even if employer did not adopt job evaluation).

301. *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1134 (5th Cir. 1983); see also *Spaulding v. University of Wash.*, 740 F.2d 686, 700-01 (9th Cir. 1984) (refusing to infer discriminatory intent from existence of wage differences between jobs that were only similar and rejecting comparability plus test); *Lemons v. City & County of Denver*, 620 F.2d 228, 229 (10th Cir.) (refusal to assess the worth of nurses' jobs as compared with other jobs in the community), cert. denied, 449 U.S. 888 (1980); *Gerlach v. Michigan Bell Tel. Co.*, 501 F. Supp. 1300, 1321 (E.D. Mich. 1980) (undervaluation of predominantly female clerical jobs does not support claim of intentional discrimination).

302. See *Power v. Barry County*, 539 F. Supp. 721, 726 (W.D. Mich. 1982) ("Supreme Court's recognition of intentional discrimination may well signal the outer limit of the legal theories cognizable under Title VII.").

303. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); cf. *B. SCHLEI & P. GROSSMAN*, *supra* note 162, at 497-99 (discussing adaptation of *McDonnell Douglas* elements in Age Discrimination in Employment Act cases).

304. See *Spaulding v. University of Wash.*, 740 F.2d 686, 701-04 (9th Cir. 1984) (examining evidence relevant to intent, including defendant's attitude toward and treatment of female faculty members); *American Fed'n of State, County & Mun. Employees v. County of Nassau*, 609 F. Supp. 695, 710-11 (E.D.N.Y. 1985) (not necessary to show that defendant disregarded its own job evaluation).

305. See *Briggs v. City of Madison*, 536 F. Supp. 435, 445 (W.D. Wis. 1982); see also *Beall v. Curtis*, 603 F. Supp. 1563, 1581 (M.D. Ga.) (following *Briggs* criteria for establishing a prima facie case), *aff'd*, 778 F.2d 791 (11th Cir. 1985); cf. *Campbell*, *supra* note 283, at 1321-23 (using regression analysis to discover employer's own job evaluation standards).

306. *Taylor v. Charley Bros. Co.*, 25 Fair Empl. Prac. Cas. (BNA) 602, 614 (W.D. Pa. 1981).

307. See, e.g., *Brennan v. South Davis Community Hosp.*, 538 F.2d 859 (10th Cir. 1976) (comparing wage disparities among hospital aides, orderlies, maids, and janitors); *Schultz v. American Can Co.-Dixie Products*, 424 F.2d 356 (8th Cir. 1970) (comparing wage disparities between male and female machine operators); *Schultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir.) (comparing wage disparities between male and female selector-packers), cert. denied, 398 U.S. 905 (1970).

experts in the field of job evaluation. The courts' reluctance to extend this reliance to Title VII cases may reflect the realization that comparable worth cases are often more complex and far-reaching than EPA claims.³⁰⁸ Their reluctance probably also stems from unwillingness to face the difficult questions posed by the incorporation of the EPA's fourth affirmative defense into Title VII cases, in particular, the role that should be accorded the market defense.

The ultimate success of comparable worth claims is likely to depend more on the role given to the market defense than on the required elements of a plaintiff's *prima facie* case. In cases in which plaintiffs rely on a deviation from the employer's own job evaluation, the employer is likely to justify the deviation as a result of market forces.³⁰⁹ In cases in which the employer has conducted no job evaluation, the challenged salary scale is often set to reflect market wages for particular jobs.³¹⁰ Thus, it appears that the critical issue in both types of cases is the extent to which Title VII allows employers to rely on or adopt the market rate, despite any depressing effect such reliance has on the wages of employees in predominantly female jobs.

The much-heralded decision of the United States Court of Appeals for the Ninth Circuit in *American Federation of State, County and Municipal Employees v. Washington (AFSCME)*³¹¹ recently focused attention on the market defense. The court refused to draw an inference of discriminatory intent from the State's adherence to market rates, despite job evaluation evidence indicating that the market undervalued predominantly female jobs.³¹² The State had employed a

308. One obvious complexity associated with comparable worth claims is fashioning an appropriate remedy. The only allowable remedy for an EPA violation is the equalization of pay rates of male and female employees to the higher male rate. *See supra* note 272. In a comparable worth case, however, the percentage pay increase that the plaintiffs should receive may be hotly contested, and it will often be necessary to resort to a technique such as job evaluation to determine the appropriate size of the increase.

309. For example, in *Briggs v. City of Madison*, 536 F. Supp. 435, 447 (W.D. Wis. 1982), the city's job survey classified the job of public health nurse at or above the level of sanitarian, but nurses were paid less than sanitarians. The city justified the pay disparity by claiming that the wage rate for sanitarians had to be increased in order for the city to compete in the market for qualified job applicants. The court accepted this modified market defense, relying on the pre-*Gunther* decision of the United States Court of Appeals for the Eighth Circuit in *Christensen v. Iowa*, 563 F.2d 353 (8th Cir. 1977). The court in *Christensen* had found no Title VII violation when defendant undertook a job evaluation study, adopted the recommended wage scales, and then modified the plan to provide higher salaries to physical plant workers in order to meet the prevailing wage rates in the community for jobs of the same type.

310. *See, e.g., Lemons v. City & County of Denver*, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980). A distinction should be made between benchmark jobs and unique jobs. Benchmark jobs are generally entry level jobs in which wages depend greatly upon outside market forces. Employers thus often pay the going market rate in benchmark jobs. Unique jobs are generally higher ranking than benchmark jobs and are filled through promotions from benchmark jobs. The wages paid for unique jobs are usually determined by the employer. If the employer uses a job evaluation study, the wages paid for benchmark jobs serve as the criteria for the job evaluation system, and the system is then used to establish wages for the unique jobs. Finally, there are some jobs in which employees are strongly committed to their occupation (e.g., lawyers), and employers generally look to the market in setting wages for the occupation. *See* 2 U.S. COMM'N ON CIVIL RIGHTS, COMPARABLE WORTH: ISSUE FOR THE 80's 51 (1984) (statement of Dr. Schwab).

311. 770 F.2d 1401 (9th Cir. 1985). The *AFSCME* litigation was ultimately settled. The state agreed to spend \$46.5 million by 1987 and \$10 million per year until 1992 to correct inequities in the State's compensation system. Labor Law Reports (CCH) Report 265, at 1 (Jan. 23, 1986).

312. *AFSCME*, 770 F.2d at 1407.

consultant to undertake a comprehensive comparable worth study of State government salaries. The study concluded that employees in predominantly female jobs were paid approximately twenty percent less than employees in predominantly male jobs, even though they performed jobs of comparable worth to the State.³¹³

If the court's treatment of the market force defense in *AFSCME* is widely accepted, it could severely limit pay equity claims. The court apparently regarded the employer's adherence to the market rate as per se reasonable and did not require the employer to defend its decision to follow the market rate in the context of the particular case. Technically, the plaintiffs in *AFSCME* lost because they failed to establish a prima facie case, not because the State successfully proved an affirmative defense of reasonable market reliance. In contrast to EPA litigation in which the employer has the burden of proving the nonsexist character of wage disparity,³¹⁴ the plaintiffs in *AFSCME* were assigned the burden of coming forward with evidence, other than evidence of job worth, to prove that the market-based system was maintained for a discriminatory purpose.³¹⁵ Such evidence of discriminatory motive in the setting of salaries is often very difficult to amass.³¹⁶

The debate over the market rate defense in Title VII cases is closely akin to the debate over the scope of the fourth affirmative defense in the EPA cases. The key difference in the Title VII jurisprudence is the absence of a leading plaintiff-oriented case like *Corning Glass*. There is no Supreme Court statement in the Title VII case law comparable to the statement in *Corning Glass* questioning the legality of reliance on market factors. The Court in *Corning Glass* was willing to read the legislative history of the EPA as endorsing a theory of discrimination designed in part to correct the effects of a discriminatory market.³¹⁷ Under the *Corning Glass* approach, employers were not allowed to profit from an inequitable market-based scheme that pays women less than men for equal work.

In contrast to *Corning Glass*, the Title VII cases in the lower courts generally regard the market as a neutral force and allow employers to act in accordance with economic realities and the laws of supply and demand, even if such action results in lower wages for predominantly female jobs.³¹⁸ Under this view,

313. *Id.* at 1403.

314. *See Corning Glass*, 417 U.S. at 196-97.

315. *AFSCME*, 770 F.2d at 1407-08. Because the *AFSCME* court concluded that plaintiffs had not established a prima facie case, it did not address the question whether defendant bore a burden of persuasion or merely a burden of producing evidence. *Compare Kouba*, 691 F.2d at 875 (employer bears the burden of persuasion to establish the "factor other than sex" defense in Title VII wage litigation) with *Briggs v. City of Madison*, 536 F. Supp. 435, 448 (W.D. Wis. 1982) (plaintiff retains the burden of persuasion throughout the litigation).

316. For example, the *AFSCME* court did not regard defendant's prior use of sex segregated want ads as sufficient to create an inference of discrimination in the setting of salaries. *AFSCME*, 770 F.2d at 1408.

317. *Corning Glass*, 417 U.S. at 195.

318. *See, e.g., Lemons v. City & County of Denver*, 620 F.2d 228, 229 (10th Cir.), cert. denied, 449 U.S. 888 (1980); *Christensen v. Iowa*, 563 F.2d 353, 356 (8th Cir. 1977); *Briggs v. City of Madison*, 536 F. Supp. 435, 447 (W.D. Wis. 1982).

an employer that relies on the market is not culpable because the market, not the employer, is seen to create the economic inequity, regardless of whether the employer is of sufficient size to influence the market rate.³¹⁹ The employer's decision to compensate female jobs at a rate lower than their evaluated worth is not viewed as a voluntary decision that unfairly takes advantage of an inequitable market. The principal difference between these Title VII market rate defense cases and *Gunther* seems to be the difference between lawfully raising men's pay to equal the market rate and unlawfully depressing women's pay below the market rate. The latter practice smacks of active, intentional discrimination; the former can be characterized as passive, nondiscriminatory adherence to market forces.

The final obstacle to using Title VII as a tool to reduce wage disparities in traditionally female jobs is some courts' hesitation to permit the use of disparate impact analysis to challenge an employer's overall wage structure.³²⁰ The best example of the use of disparate impact analysis in a wage controversy is the opinion of the United States District Court for the Western District of Washington in the AFSCME litigation.³²¹ The district court relied on the State-commissioned comparable worth study to find that the State's compensation system had a disparate impact on predominantly female job classifications.³²² The court concluded that the State should be held liable because it had not proved a legitimate, overriding business justification for the disparity.³²³

The district court's straightforward use of disparate impact analysis in *AFSCME* was reversed by the United States Court of Appeals for the Ninth Circuit.³²⁴ The court of appeals adopted the favored, more conservative approach holding that an employer's compensation system does not constitute a policy susceptible to a disparate impact challenge.³²⁵ This conservative approach restricts disparate impact challenges to specific employer practices that are not related to market prices, such as hiring tests and other discrete selection procedures.³²⁶ In tune with the readiness of some courts to view market forces

319. For example, the plaintiff class in *AFSCME* consisted of approximately 15,500 State employees who worked in predominantly female jobs. *AFSCME*, 770 F.2d at 1403. Despite the relative importance of the State as an employer, the court viewed the State's decision to rely on market rates as constrained by market forces beyond the State's control. *Id.* at 1407.

320. See *supra* note 299 and accompanying text.

321. 578 F. Supp. 846 (W.D. Wash. 1983), *rev'd*, 770 F.2d 1401 (9th Cir. 1985).

322. *Id.* at 861.

323. *Id.* at 863.

324. *AFSCME*, 770 F.2d at 1405-06 (employer's decision to rely on market-based compensation system is "too multifaceted" for disparate impact analysis).

325. *Id.* at 1407-08; see *Spaulding v. University of Wash.*, 740 F.2d 686, 708 (9th Cir. 1984).

326. See, e.g., *Atonio v. Wards Cove Packing Co.*, 768 F.2d 1120, 1133 (9th Cir. 1985) (broad scale attacks against a wide range of policies are inappropriate under disparate impact approach); *Pouncey v. Prudential Ins. Co.*, 668 F.2d 795, 800 (5th Cir. 1982) (disparate impact model is not an appropriate means to launch a wide-ranging attack on employment practices); *Heagney v. University of Wash.*, 642 F.2d 1157, 1163 (9th Cir. 1981) (classification of certain employees as "exempt" and not subject to salary adjustments under State personnel law was not a well-defined, objective employment practice subject to disparate impact analysis). But see *Griffin v. Carlin*, 755 F.2d 1516, 1522-25 (11th Cir. 1985) (disparate impact analysis is proper means to challenge final result of overall promotion process). See generally D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION § 1.23, at 24 (Supp. 1985) (analysis of cases treating scope of disparate impact theory).

as a defense, there is a simultaneous refusal to view reliance on the market price for labor as *prima facie* discriminatory. This "respect" for the market may lead courts to view employers as mere market players that cannot be held responsible for the rules of the game:

Every employer constrained by market forces must consider market values in setting his labor costs. Naturally, market prices are inherently job-related, although the market may embody social judgments as to the worth of some jobs. Employers relying on the market are, to that extent, "price-takers." They deal with the market as a given, and do not meaningfully have a "policy" about it in the relevant Title VII sense.³²⁷

This attitude conflicts fundamentally with the theory underlying disparate impact analysis. The theory requires employers to bear some of the costs of societal discrimination by dismantling unnecessary barriers to equal employment opportunity.³²⁸ Even the use of well-established, facially reasonable policies must be justified if the policies are subject to a disparate impact challenge. Refusing to classify an employer's market reliance as a policy susceptible to a disparate impact challenge only evades the more important question whether market reliance is justified in the circumstances of individual cases.

In sum, most comparable worth cases have accepted the principle of comparable pay for work of comparable value only in those instances in which an employer's pay structure may be characterized as intentionally designed to discriminate against women. No consensus, however, has emerged as to the specific elements of such a claim of intentional discrimination. Whether comparable worth theory will ultimately improve the lot of part-time workers thus depends on the particulars of such a refined disparate treatment framework for adjudicating claims of sex-based wage discrimination under Title VII.

D. *Fitting Comparable Worth to Part-Time Work*

Perhaps more than any other group of predominantly female employees, part-time workers need judicial acceptance of comparable worth theory to up-

327. *Spaulding v. University of Wash.*, 740 F.2d 686, 708 (9th Cir. 1984).

328. See *Chamallas*, *supra* note 197, at 365-70. The courts' resistance to disparate impact theory in wage cases may have influenced the outcome of some class actions based primarily on a disparate treatment theory. In attacking an employer's wage structure as discriminatory under a disparate treatment theory, a plaintiff must prove more than a gross wage disparity between male and female employees. The parties typically use sophisticated statistical techniques to control for neutral factors that influence the employer's pay scheme. If a disparity remains unexplained, an inference of discrimination may be drawn. In many cases, there is a preliminary debate as to whether certain sex-linked variables can be used to explain pay disparities or should be excluded from the explanatory model to avoid perpetuation of past disparate treatment. Such variables may include job rank, prior salary, and even job department or job category, because such factors are likely to reflect patterns of discrimination against women. See D. BALDUS & J. COLE, *supra* note 326, § 1.14, at 23 (1980). Some courts' requirement that a plaintiff's regression model include such sex-linked factors is consistent with the overall reluctance to embrace comparable worth theory as a tool to lessen pay disparities produced by occupation segregation. See *Sobel v. Yeshiva*, 566 F. Supp. 1166 (S.D.N.Y. 1983). But cf. *EEOC v. Akron Nat'l Bank*, 497 F. Supp. 733, 755 (N.D. Ohio 1980) (To defeat a claim of discrimination in promotion, defendant bank could not include part-time status in regression analysis because of inherent sexual bias.).

grade their status. Part-time workers tend to be doubly disadvantaged; they are crowded into predominantly female jobs and their part-time status is then used to justify unfavorable treatment.

One of the aims of comparable worth theory is to expose the degree to which pay scales in predominantly female jobs reflect the sex of the job holders, rather than more objective, non-sex-based factors such as job worth. For the reasons discussed in Parts I and II of this Article, part-time job status, like particular job categories, should be recognized as a classification that potentially masks sex discrimination. In essence, the female part-time worker's complaint is that her disproportionately low wages result in part from the predominantly female character of her working group. The part-time worker contends that, if the part-time work force were truly sexually integrated, pay rates for the group would be raised. Under this view, individual employers may be held responsible for sex-based discrimination against part-time workers insofar as they use part-time status as a device to depress the wages of women.

1. The Part-Time Worker's Double Burden

Of the many analytic frameworks proposed for Title VII comparable worth litigation, the approach advocated by Winn Newman and Jeanne Vonhof³²⁹ has special relevance for the part-time work force. Newman and Vonhof argue that plaintiffs in predominantly female jobs should be allowed to raise an inference of intentional sex discrimination in wages by showing a pattern of employer-controlled job segregation coupled with disproportionately low wages.³³⁰ In their view, an employer that is guilty of discriminatory assignment by intentionally excluding women or channeling women away from desirable jobs is also likely to devalue the segregated work that women do.³³¹ As an administrative matter, such job segregation facilitates wage discrimination.³³² It is less risky for an employer to pay lower wages to women by separating them into different job categories with lower pay rates than to violate the EPA by paying men more for performing equal work.

Newman and Vonhoff's analysis exposes the symbiotic relationship between job segregation and wage discrimination at the single plant or single employer level. Their analysis demonstrates how lack of access to higher paying jobs may result in a double burden: the employee is denied the better job and simultaneously is shunted into a job that is paid at a rate even lower than its evaluated worth.

Voluntary part-time workers are similarly burdened by lack of access to desirable jobs and devalued wages in segregated jobs. Because employers have severely limited the number of higher paying part-time positions, part-time

329. Newman & Vonhof, "Separate But Equal"—*Job Segregation and Pay Equity in the Wake of Gunther*, 1981 U. ILL. L. REV. 269.

330. *Id.* at 287.

331. *Id.* at 271.

332. *Id.* at 300; cf. Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041, 1084-85 (1984) (school board's use of racial segregation facilitates disparate treatment of black children).

workers are relegated to inferior jobs that are paid at a rate lower than their evaluated worth. The key difference between the predicament of the female full-time worker and that of the part-time worker lies in the different mechanisms used to maintain job segregation by sex. In the full-time work force, employers maintain segregation by discriminatory job assignments. In the part-time work force, employers maintain segregation by limiting the types of jobs that can be filled on a part-time basis. Although these practices have the same effect on employees, the different discriminatory mechanisms carry significantly different legal consequences. The full-time worker may sue under Title VII, alleging discriminatory assignment. The proof problems in such a case are often severe, but the full-time worker is at least assured a cause of action. The part-time worker, however, has no cause of action under Title VII for the employer's failure to create desirable part-time opportunities. The part-time worker must rely exclusively on the controversial concept of comparable worth. As in many other areas of the law, the distinction between harmful action and harmful inaction creates an anomalous patchwork of relief.

2. Reforming Title VII for Part-Time Workers

The twin problems of lack of access to desirable part-time jobs and devaluation of existing part-time work may be addressed by refining the comparable worth litigation framework to meet the special needs of part-time workers. Like their full-time counterparts, part-time workers in predominantly female jobs should be able to establish *prima facie* cases of wage discrimination by showing that they perform work that is undervalued relative to the work done by full-time male workers. At this point, the framework should be adjusted to fit the part-time work setting. Employers should be permitted to rebut an inference of discrimination by showing either that the plaintiff's assessment of job comparability is flawed or that the employer has provided a significant number of part-time jobs that are compensated at a relatively high rate.

The framework outlined above is a variant of the typical Title VII disparate treatment analysis. Disparate treatment analysis seeks to discover whether an underlying reason for adverse treatment is sex-based.³³³ The elements of a plaintiff's *prima facie* case constitute those factors that "if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."³³⁴ Disparate treatment analysis generally requires plaintiffs to eliminate the most likely neutral explanations for the employer's conduct.³³⁵ If the

333. The Supreme Court has described the test in Title VII claims of sex-based disparate treatment as a "but-for" inquiry: whether the evidence shows treatment of a person in a manner which "but for that person's sex would be different." *Manhart*, 435 U.S. at 711. The Court used a similar formulation in the leading constitutional sex discrimination case. See *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (test is whether defendant's action was taken "at least in part 'because of,' and not merely 'in spite of,' its adverse effects upon an identifiable group").

334. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

335. In *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977), the Supreme Court noted that the four elements of plaintiff's *prima facie* case eliminate the two most common legitimate reasons for which an employer may reject a job applicant: lack of qualifications and lack of a vacancy in the position sought.

plaintiff states a prima facie case, the employer must rebut the inference of discrimination by adducing evidence of a legitimate, nondiscriminatory reason for the plaintiff's unfavorable treatment. The plaintiff retains the burden of persuasion throughout the litigation and may counter the employer's rebuttal by proving pretext—that the employer's proffered reason was not the true reason for its action.³³⁶ Although the issue is debatable, courts generally have not required plaintiffs to show actual employer hostility toward either particular female plaintiffs or toward women in general.³³⁷ Instead, courts find sex-based discrimination if the employer would not have treated the plaintiff unfavorably had the plaintiff been a male.

The comparable worth proposal for part-time workers discussed above resembles the typical disparate treatment case in that it requires plaintiffs to eliminate one of the common explanations for disparity in pay rates, namely job worth. Once it is established that a disparity in pay for part-time workers is not justified or explained by factors accepted as part of established job evaluation principles, a suspicion arises that the employer may be intentionally using the workers' part-time status to depress the wages of women. The most convincing evidence an employer can adduce to dispel this suspicion is a factual showing that, at its workplace, part-time status is not strongly associated with low wages. For example, a showing that the average wage for part-time workers is not significantly lower than the average wage for full-time workers would be highly probative evidence that the employer is not using part-time status to disadvantage women. If opportunities to secure higher paying part-time positions exist, the employer can show that its part-time work force is not caught in the double bind of no access to desirable jobs followed by devalued wages for existing jobs. If a voluntary part-time worker can escape the problem of undervaluation of her existing employment by switching to a higher paying part-time job, her part-time status should not be regarded as a significant barrier to higher pay. An employer who fills a considerable number of high paying jobs with part-time personnel also displays the kind of receptiveness to part-time work that makes it unlikely that the employer used the part-time classification for discriminatory purposes.

The proposal advanced in this Article departs from the traditional disparate treatment analysis in that it permits an employer to adduce only two types of evidence to rebut a plaintiff's prima facie case: evidence of lack of job comparability or evidence of equal access for part-time workers to high paying jobs.

336. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-56 (1981).

337. See, e.g., *EEOC v. Brown & Root*, 688 F.2d 338, 340 (5th Cir. 1982); *Phillips v. United Bhd. of Carpenters & Joiners*, 598 F. Supp. 40, 44 (E.D. Ark. 1984); *Shaw v. Boorstin*, 517 F. Supp. 336, 338-39 (D.D.C. 1981); *Oshiver v. Court of Common Pleas*, 469 F. Supp. 645, 652 (E.D. Pa. 1979). But see *Craft v. Metromedia, Inc.*, 572 F. Supp. 868, 878 (W.D. Mo. 1983) (court found plaintiff showed no "specific animus" toward women or toward plaintiff as a woman), *aff'd*, 766 F.2d 1205 (8th Cir. 1985). For commentary on the meaning of the intent requirement in disparate treatment cases, see C. SULLIVAN, M. ZIMMER & R. RICHARDS, *FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION* § 1.4(b), at 18-22 (1980); Bartholet, *Proof of Discriminatory Intent Under Title VII: United States Postal Service Board of Governors v. Aikens*, 70 CALIF. L. REV. 1201 (1982); Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982).

Other types of rebuttal evidence are not permitted. For example, that an employer has hired a significant number of women in high paying full-time positions or has otherwise engaged in affirmative action should not be considered in determining whether a wage disparity between full-time and part-time workers is sex-based. Nor may an employer rely on the market rate to prove that it has not intentionally lowered the wage rate for part-time workers below the market level.

These limitations on the disparate treatment model are needed because the aim of a comparable worth suit in the part-time context is to arrive at a fair assessment of part-time work, untainted by the predominant sex of the working group. Under the proposal, an employer is required to treat this important group of predominantly female workers with the same consideration that it extends to the majority of its workers. From this perspective, it is not enough that an employer show due regard for full-time women workers. In the second generation of sexism, the law should protect against discriminatory mechanisms that divide and conquer traditionally disadvantaged groups. It is discriminatory to leave a significant minority of women workers unprotected while protecting virtually all male workers.³³⁸ The difficulty of detecting discrimination against part-time workers and the ability of some women workers to secure equal treatment should not foreclose relief to part-time workers victimized by discrimination. Comparable worth theory goes beyond tokenism and tests the rationality of seemingly neutral distinctions that are used to disadvantage discrete groups of women. Thus, in applying comparable worth theory, it is proper to focus only on the treatment of part-time workers as a distinct group of predominantly female workers. An employer's favorable treatment of full-time female workers therefore is not sufficient to dispel an inference of discrimination.

It is also essential that employers be precluded from relying on the market rate for part-time workers to rebut a plaintiff's claim of discriminatory treatment. As many commentators have argued,³³⁹ the market rate is not always neutral. The legislative history of the EPA documents Congressional recognition that the market can and does discriminate against women.³⁴⁰ In the part-time context, the market rate reflects the fact that part-timers have been excluded from higher paying positions and segregated into lower paying jobs. Comparable worth theory attempts to substitute a more gender-neutral assessment of job worth than the market supplies. Although job evaluation techniques are not always unbiased,³⁴¹ they tend not to disadvantage women to the same

338. In other contexts courts have recognized that discrimination against a subgroup of a protected group is actionable. For a discussion of the rejection of the so-called "sex-plus" and "same sex selection" defenses see Chamallas, *Exploring the "Entire Spectrum" of Disparate Treatment Under Title VII: Rules Governing Predominantly Female Jobs*, 1984 U. ILL. L. REV. 1, 9-17, 19-22.

339. See, e.g., Newman & Vonhof, *supra* note 329, at 311-15; Vieira, *supra* note 287, at 473-76; Note, *supra* note 287, at 437-42.

340. See S. REP. NO. 176, 88th Cong., 1st Sess. 1 (1963).

341. For commentary on the difficulty of formulating and applying unbiased standards of job evaluation, see WOMEN, WORK AND WAGES, *supra* note 30, at 77-78; Law, *supra* note 128, at 1305-10; Schwab, *Job Evaluation and Pay Setting: Concepts and Practices*, in EQUAL EMPLOYMENT OPPORTUNITY ADVISORY COUNCIL, COMPARABLE WORTH: ISSUES AND ALTERNATIVES 49, 59-60

degree as does market reliance.³⁴²

Comparable worth theory will lose much of its reform potential if employers may avoid liability by relying on a collective market assessment that incorporates the discriminatory judgments and actions of others. In Title VII suits alleging discrimination in areas other than wage rates, employers have not been permitted to use the sex-based preferences of others as the basis for their own practices and policies.³⁴³ The proposal advanced in this Article embodies the judgment that employers that perpetuate a system of depressed wages for part-time workers by excluding part-time workers from high paying jobs in their establishments should not be afforded a market defense.

The principal inquiry in a comparable worth disparate treatment analysis is whether the employer's market reliance is neutrally grounded or is used to accomplish a discriminatory objective. Because market reliance has been used for discriminatory purposes, it makes sense to be somewhat skeptical when an employer claims that it is following the market only for the information the market conveys concerning the relative utility of certain jobs. The proposal set forth above strives to ascertain the reason for an employer's market reliance by examining the employer's overall treatment of part-time workers, both with respect to pay and access to desirable jobs.

Allowing employers to rebut inferences of discrimination by showing that they provide adequate access to high paying part-time jobs not only dispels doubts about the neutrality of an employer's wage decisions, but also provides an incentive for employers to create desirable part-time jobs. The comparable worth movement has raised public consciousness about the devaluation of women's work. Traditional Title VII theory affords women legal access to full-time work. The proposal advanced here confronts the unmet needs of the part-time work force for pay equity and equal access.

The proposed framework for litigating Title VII part-time work cases does not represent a serious departure from relevant precedent. The proposal uses a variant of disparate treatment analysis rather than a pure disparate impact

(E. Livernash ed. 1980); Remarks of Professor Bartholet, Daily Lab. Rep. (BNA) No. 113, at D-1 (June 12, 1985).

342. Comparable worth studies conducted in several states indicate that substantial pay disparities exist between male and female employees performing comparable jobs. For example, studies in the State of Washington since 1974 indicated a 20% salary disparity between predominantly male and predominantly female jobs requiring an equivalent or lesser composite of skill, effort, responsibility, and working conditions as reflected in the number of job evaluation points assigned. American Fed'n of State, County & Mun. Employees v. Washington, 578 F. Supp. 846, 864 (W.D. Wash. 1983), *rev'd*, 770 F.2d 1401 (9th Cir. 1985). A Wisconsin study revealed that clerical employees were underpaid relative to comparable blue collar employees by approximately \$2,300 to \$2,500 a year. A. COOK, *supra* note 285, at 80-81. A Minnesota study disclosed "substantial disparities" between salaries of male and female State workers. Rothchild, *Toward Comparable Worth: The Minnesota Experience*, 2 YALE L. & POL'Y REV. 346, 354-55 (1984); *see also* Note, *The Minnesota Comparable Worth Statute*, 6 HAMLINE J. OF PUB. L. 21, 23 (1985) (discussing the Minnesota study).

343. *See, e.g.*, Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981); Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971); Jatczak v. Ochburg, 28 Fair Empl. Prac. Cas. (BNA) 1773 (E.D. Mich. 1982); Wilson v. Southwest Airlines, 517 F. Supp. 292 (N.D. Tex. 1981). *See generally* Chamallas, *supra* note 338, at 7-9 (discussing explicit sex-based cases).

model. Under pure disparate impact analysis, an employer would be required to justify any structural policy having a disparate impact on women. Thus, an employer would be required to show that a low wage rate for a predominantly female job was a business necessity. In such disparate impact litigation, the sole focus would be on job worth, as measured by job evaluation principles.³⁴⁴ By allowing the adequate access rebuttal, the disparate treatment proposal advanced here would focus litigation on an employer's purpose in creating and maintaining a part-time classification, not directly and exclusively on job worth. Under this proposal, job evaluation would be used to uncover purposeful discrimination. This focus on purposeful discrimination accords with the restrictive *Gunther* dicta and the reluctance of most lower courts to embrace a full-fledged disparate impact model for sex-based wage discrimination claims.

VI. CONCLUSION

The importance of part-time work to the economic sustenance of millions of Americans compels the law's attention to ensuring equity for part-time workers. This need is compounded by the predominantly female composition of the part-time work force and by evidence that the sex-segregated character of that work force has contributed to conditions of inequitably low pay and unjustifiably negative employer expectations. The relatively low prestige of part-time work, however, raises doubts about whether reform in this area will significantly improve the economic status of working women. What is needed to allay this concern is a legal strategy for part-time workers aimed at achieving both pay equity and access to jobs that are economically rewarding and traditionally dominated by men.

An important first step in achieving these goals is to redirect the interpretation of existing pay equity law in a way that is attuned to the problems of part-time workers. If interpreted strictly, the Equal Pay Act is well-suited to redressing claims of women part-time workers who are paid less than their full-time male colleagues for equal work. Title VII may reach an even broader class of part-time workers through a specially designed comparable worth approach.

The effective application of either statute, however, requires attention to the kinds of defenses that employers will be allowed to assert in response to charges of sex discrimination against part-time workers. Because of the strong consensus behind the policy of the EPA, pay disparities between part-time and full-time work should be eliminated, unless there is a showing that a challenged pay disparity reflects objective differences in the types of jobs performed or in the abilities or performances of the workers. Although a similar objective approach under Title VII would be attractive, recent comparable worth decisions indicate that courts are unlikely to adopt such a full-blown disparate impact theory. The proposal advanced here thus attempts to protect part-time workers through disparate treatment claims of intentionally depressed pay for predominantly female

344. See *American Fed'n of State, County & Mun. Employees v. Washington*, 578 F. Supp. 846, 863-64 (W.D. Wash. 1983), *rev'd*, 770 F.2d 1401 (9th Cir. 1985).

part-time jobs. Under the proposal, employers may rebut claims of disparate treatment only by showing unequal job worth or by showing that the part-time employees in their work forces have equal access to high paying part-time jobs. Pending more comprehensive legislative attempts in the future to provide full economic equity to part-time workers, these doctrinal innovations should stimulate some advances in nondiscriminatory treatment and job access for part-time workers.

